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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1912~~ 1913

No. ~~800~~ 353

S. S. WHITE DENTAL MANUFACTURING COMPANY,
PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED OCTOBER 5, 1912.

(23,375)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 28, 1913.

a COMMONWEALTH OF MASSACHUSETTS:

I, Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, do certify that John F. Cronin, Esquire, whose signature is affixed to the papers hereto annexed, is Clerk of said Court, holden at Boston, in and for the County of Suffolk, in said Commonwealth, and hath the keeping of all the ancient files, records, and proceedings of said Court throughout the Commonwealth, down to the first day of August A. D. 1797, as well as of the files, records, and proceedings of said Court holden as aforesaid, for said County of Suffolk, subsequent to that time; and is, by law, the proper person to make out and to certify copies of all the records and proceedings of the said Supreme Judicial Court previous to the said first day of August A. D. 1797, as well as of all records and proceedings of the said Court, holden as aforesaid, for the said County of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the papers hereunto annexed is in due form.

In testimony whereof, I have hereunto set my hand, and caused the seal of said Court to be hereunto affixed, this thirtieth day of September in the year one thousand nine hundred and twelve.

[SEAL.] ARTHUR P. RUGG,
Chief Justice Sup. Jud. Ct.

1 UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the Honorable the Judges of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston within and for the County of Suffolk. Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between S. S. White Dental Manufacturing Company, Petitioner, and Commonwealth of Massachusetts, Respondent, in a plea of a Petition in equity, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened,

to the great damage of the said S. S. White Dental Manufacturing Company, Petitioner, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the twelfth day of September in the year of our Lord one thousand nine hundred and twelve.

CHARLES K. DARLING,
Clerk of the District Court of the United States,
District of Massachusetts.

Allowed by
ARTHUR P. RUGG,
Chief Justice of the Supreme Judicial Court
of the Commonwealth of Massachusetts.

2 [Endorsed:] 17364 Eq. S. S. White Dental Mfg. Co. vs. Commonwealth of Massachusetts. Writ of Error. Suffolk, ss: Supreme Judicial Court. Filed Sept. 12, 1912. John F. Cronin, clerk.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

And now, here, the Judges of the Supreme Judicial Court, make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I John F. Cronin, Clerk of said Supreme Judicial Court have hereto set my hand and the seal of said Court this twenty-first day of September, A. D. 1912.

[SEAL.] JOHN F. CRONIN, *Clerk.*

3 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know Ye, That among our Records of our Supreme Judicial Court, sitting at Boston in said County of Suffolk for the hearing of cases in Equity, from the first day of January in the year of our Lord One thousand nine hundred and twelve to the thirty-first day

of December in said year, both inclusive, it is thus contained,—the following being the entire record in the case:

4 COMMONWEALTH OF MASSACHUSETTS,
Suffolk County:

Supreme Judicial Court. In Equity.

No. —.

S. S. WHITE DENTAL MANUFACTURING COMPANY, Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS, Respondent.

Petition.

To the Honorable the Justices of the Supreme Judicial Court sitting in equity within and for the County of Suffolk:

Respectfully represents the S. S. White Dental Manufacturing Company, petitioner, as follows:

1. That your petitioner is a corporation duly established and existing under the laws of the State of Pennsylvania with an authorized capital stock of the total par value of 1,000,000 dollars, and having an usual place of business in Boston, in said County of Suffolk.

2. That your petitioner is engaged in carrying on and transacting a portion of its business within the limits of said Commonwealth, such portion consisting partly of interstate commerce and partly of intrastate or domestic business.

That the offices and usual place of business maintained by your petitioner in said Commonwealth are so maintained for the joint purposes and uses of its interstate commerce, and its domestic or intrastate business, without distinction, discrimination or apportionment. That the domestic portion of the Company's business, conducted and managed at the offices and usual place of business so maintained, is so closely interwoven and connected with the
5 interstate commerce portion of your petitioner's business, that it could not be given up or abandoned without imposing additional burdens upon or without serious detriment to the interstate commerce portion of the Company's business.

That your petitioner is engaged in the work of conducting, as its principal function interstate commerce, consisting of sales and agreements for the sale of its products and merchandise entered into and made in certain States of the United States for delivery in other States and in foreign countries, and of the transportation and delivery of its products and merchandise to the consumers or buyers thereof, residing or located in States other than those where such sales or contracts of sale are made, and in foreign countries.

That the principal part of the business conducted, managed or directed by your petitioner, at its office or usual place of business in Massachusetts, consists of interstate commerce, the general management and direction thereof, and the financial management and di-

rection of the receipts therefrom, and of the capital, assets and funds used therein, and such office and usual place of business is used mainly for the interstate commerce portions of its business or purposes incident thereto, which have no material reference to the domestic portion of its business.

3. That by far the larger part of the capital, property and assets of your petitioner are permanently invested and located beyond the limits of said Commonwealth, and by far the larger part of its capital, property and assets are used and employed for the pur-
6 poses of the interstate commerce portion of its business, and in no way concerns the domestic or intrastate portion of its business conducted wholly within said Commonwealth.

4. That pursuant to the foreign corporation laws of said Commonwealth contained in Sections 58-60 of Chapter 437 of the Acts of 1903, or similar provisions previously in force and the acts amendatory thereof, your petitioner was duly admitted as a foregoing corporation to do business in said Commonwealth, and was duly authorized to maintain an usual place of business therein, upon payment of certain fees prescribed by said Commonwealth, and duly paid such fees, and thereafter paid and continued to pay yearly the foreign corporation taxes prescribed by Section 75 of said Chapter 437, of the Acts of 1903, or prescribed by the provisions of law in force prior thereto, or at the time your petitioner was admitted to do business, and to maintain an office and an usual place of business in said Commonwealth.

5. That Section 56 of Part 111 of Chapter 490 of the Acts of 1909, provides for the payment by a foreign corporation having an usual place of business in said Commonwealth, as a condition of its continuing to do any kind of business in said Commonwealth, whether interstate or intrastate, of an annual excise tax amounting to one-fiftieth of one per centum of the par value of the total authorized capital stock of such corporation, but not exceeding a maximum tax of $2,000 per annum, such excise tax being, in effect, based on all the capital, property, business and interests of such corporation everywhere, including both its interstate and intrastate business and property, without regard to any apportionment or distinction
7 between its interstate commerce and the amount of property or capital engaged therein, and its domestic or intrastate business and commerce transacted wholly within said Commonwealth, and the amount of capital, assets or property engaged therein.

6. That the said Chapter 490 further requires foreign corporations, as a condition of their continuing to do any kind of business in said Commonwealth, to submit to the payment of said excise tax, and thus to surrender their constitutional exemption, under the Federal Constitution, from State taxation, direct or indirect, with respect to their interstate commerce and business, and their property located outside of the said Commonwealth, particularly by requiring annual returns or certificates of their condition under onerous penalties for delays, and by providing in Section 55 of Part 111 of said Chapter, that such returns cannot be filed at all unless accompanied with payment of said excise tax.

7. That under and pursuant to the provisions of Section 56 of Part 111 of Chapter 490 of the Acts of 1909, the said Commonwealth assessed and imposed upon your petitioner an excise tax for the year 1911 of one-fiftieth of one per centum of the par value of the total authorized capital stock of your petitioner, such tax amounting to 200 dollars, and payment of said tax was exacted from your petitioner simultaneously with the making of its annual return, under said Chapter 490, and as a condition of its being allowed to file such return, or to continue to do any business or maintain an usual place of business in said Commonwealth.

8 That your petitioner duly paid the aforesaid amount of said excise tax so assessed upon it to the Treasurer of said Commonwealth on May 6, 1911.

That said excise tax was illegally assessed, imposed and exacted, and your petitioner is entitled to recover the same from said Commonwealth under this petition, pursuant to the provisions of Section 70 of Part 111 of said Chapter 490.

8. That the said excise tax should not have been assessed or imposed upon your petitioner, or exacted from it for the following reasons, namely,—

(*a*) Because Section 56 of Part 111 of Chapter 490 of the Acts of 1909 of Massachusetts, as applied to foreign corporations, including your petitioner, engaged to any extent in interstate commerce, whether partly or exclusively so engaged, is null and void, in that it requires payment by such foreign corporations, including your petitioner, of an excise tax of a given per cent. of the total authorized capital stock of such corporations, based in effect on all their property, capital, business and interests everywhere, including both their interstate and intrastate business, commerce and property, and thereby imposes a burden on the interstate portion of the commerce and business of such corporations, thus constituting an unlawful regulation of interstate commerce in contravention of the commerce clause embodied in Article 1 of Section 8 of the Constitution of the United States.

(*b*) Because said Section 56, as applied to foreign corporations, including your petitioner, having real estate and other property situated wholly outside of said Commonwealth, is null and void because subjecting their property outside of said Commonwealth

9 to taxation, and in undertaking to make the payment of a tax upon property beyond the borders of the State, a condition of doing domestic business within the State, and accordingly in depriving them of their property without due process of law, and in denying them the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution.

(*c*) Because the principal function of your petitioner's business is interstate commerce.

Wherefore your petitioner brings this petition against the Commonwealth of Massachusetts, the respondent herein, and prays that the aforesaid excise tax, amounting to 200 dollars, paid to the said Commonwealth by your petitioner, may be adjudged to have been illegally assessed, imposed and exacted, and that the amount thereof

may be returned to your petitioner by said Commonwealth, with interest thereon from the date of payment, and for such other and further relief as this Honorable Court may deem meet.

S. S. WHITE DENTAL MANUFACTURING COMPANY,
By SNOW & KNIGHT,
WM. P. EVERTS,
Its Solicitors and Counsel.

10 This petition was filed and entered in our said Supreme Judicial Court, on the fourth day of November, A. D., Nineteen Hundred and Eleven,—the petitioner appearing by Snow, Knight & Everts, Esquires, its attorneys; and service of the same was accepted for the respondent Commonwealth, by James M. Swift, Attorney-General of said Commonwealth, in writing thereon as follows, viz:

"Service accepted for Com'th.

JAMES M. SWIFT,
Attorney General,
By ANDREW MARSHALL,
Ass't Att'y Gen.

Nov. 4, 1911.

And on the thirtieth day of December in said year the respondent corporation, Commonwealth of Massachusetts, filed its answer, as follows, to wit:

11 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court. In Equity.

S. S. WHITE DENTAL MANUFACTURING COMPANY, Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS, Respondent.

Answer of the Commonwealth of Massachusetts.

The respondent, the Commonwealth of Massachusetts, for answer to the petition in the above entitled cause says,—

1. That in reply to the allegations of the paragraph numbered 1 of said petition it admits that the petitioner is a corporation established and existing under the laws of the State of Pennsylvania, engaged in the business of manufacturing and selling dental supplies for profit, with an authorized capital stock of one million dollars divided into shares, and having a usual place of business in the City of Boston in the County of Suffolk within the Commonwealth of Massachusetts.

2. That in reply to the allegations of the paragraph numbered 2 of said petition the respondent admits that the petitioner is engaged in carrying on and transacting a portion of its business within the

limits of the Commonwealth, but denies that such portion
12 consists partly of interstate commerce.

Further answering the allegations of said paragraph the respondent admits that the place of business maintained by the petitioner within the Commonwealth of Massachusetts as aforesaid is maintained for the purpose and uses of domestic or intrastate business.

And this respondent specifically denies that the petitioner is engaged in the work of conducting as its principal function interstate commerce, and specifically denies that the petitioner is engaged in the transportation or delivery of its products, but says that the petitioner does not transport its products and does not make delivery of its products except when such delivery may be made over the counter or by messenger within the borders of the State where the sale is made.

And the respondent further says that the petitioner is not engaged in any kind of interstate commerce for hire as its chief function, but that on the contrary the petitioner is engaged in the manufacture and sale of dental supplies for profit as its chief function, and that it has no more connection with interstate commerce that have other manufacturing corporations which prepare property for sale in the market, and that if any part of the business of the petitioner as said part is transacted may be considered as strictly interstate commerce, such part is only incidental to the main business of the petitioner, which is the manufacture and preparation of dental supplies for sale and the sale of said supplies in the market.

And further answering the allegations of said paragraph
13 numbered 2, the respondent specifically denies that the principal part of the business conducted, managed or directed by the petitioner at its usual place of business in the Commonwealth of Massachusetts consists of interstate commerce, and denies that said place of business is used mainly for any portions of the petitioner's business which may be so conducted as to constitute interstate commerce, but admits that if any portions of the business of the petitioner are so conducted and managed and directed at said place of business as to constitute interstate commerce said portions have no material reference to the domestic portion of its business conducted within the Commonwealth of Massachusetts.

3. That in reply to the allegations of the paragraph of said petition numbered 3 the respondent denies that the larger part of the petitioner's capital, property and assets are used and employed for the purposes of interstate commerce, but admits that if any portions of the petitioner's business are so conducted as to be considered as constituting interstate commerce such portions in no way concern the domestic or intra-state portion of its business conducted wholly within the Commonwealth of Massachusetts.

And further answering the allegations of said paragraph numbered 3, the respondent says that since the tax in question, as defined by the statutes, as assessed and imposed and collected by the Commonwealth is not in its name, nature, or effect a property tax, but is

and has uniformly in this Commonwealth been treated as an
14 excise tax assessed upon the privilege of maintaining a usual place of business for the uses of domestic business in this Commonwealth, measured by one-fiftieth of one per cent. of the authorized capital stock (reference to said capital stock being made merely as a reasonable and convenient standard of measurement), it is immaterial for the purposes of this case whether or not the larger part of the capital, property and assets of the petitioner is located beyond the limits of the Commonwealth.

4. That in reply to the allegations of the paragraph numbered 4 of said petition the respondent admits that the petitioner was duly admitted as a foreign corporation to do business within the Commonwealth of Massachusetts subject to the provisions of the laws of said Commonwealth, and further says that in consequence of said admission and in consequence of its submission to the corporation laws of said Commonwealth and its compliance with said laws, the petitioner was authorized to maintain a place for the transaction of domestic or intra-state business therein, and since its said admission and authorization has maintained such usual place of business within said Commonwealth, and has each year until the year 1911 paid without protest an excise tax of precisely the same nature as the tax now in question, which said tax has been levied by the Commonwealth for the privilege of having a usual place of business for the transaction of domestic business within this Commonwealth, with the protection of the laws of this Commonwealth, and the financial and other advantages of the situation within said Commonwealth.

15 5. That in reply to the allegations of the paragraph numbered 5 of said petition, the respondent denies each and every allegation of said paragraph.

And further answering, the respondent says that the tax imposed under the provisions of St. 1909, c. 490, part III, §56, is not imposed as a condition upon the doing of any kind of business, whether interstate or intra-state, but is imposed only as a charge for the privilege of maintaining a place of business in this Commonwealth, which is used for the purposes of domestic or intra-state business, and that said charge is not a condition upon the right to do interstate commerce, and that the statute under which said tax is imposed does not apply to or in any way affect the petitioner in regard to that portion of its business which it has a right to conduct without regulation from the Commonwealth of Massachusetts, and that injunctions issued under the provisions of said statute to enforce payment of taxes imposed by said statute are in practice limited in their application to enjoining only the domestic or intra-state business.

And further answering, the respondent says that said tax is not either in name or in effect a property tax based on all the capital, property, business, and interests of said corporation everywhere, as stated in said paragraph 5 of the petition, but is an excise tax, merely measured by one-fiftieth of one per cent. of the authorized capital of the petitioner as a reasonable and convenient standard of measurement.

16 6. That in reply to the allegations of the paragraph numbered 6 of said petition, the respondent denies each and every allegation of said paragraph.

And further answering the allegations of said paragraph, the respondent makes substantially the same reply which it made to the allegations of the paragraph numbered 5 of said petition, and says that neither the requirement for the payment of an excise tax nor the requirement for the filing of the annual return or certificate of condition is made as a condition of the right of the petitioner to do or to continue to do interstate business.

7. That in reply to the allegations of the paragraph numbered 7 of said petition, the respondent admits that it assessed and imposed an excise tax upon the petitioner for the year 1911, which was measured by one-fiftieth of one per cent. of the par value of the total authorized capital of the petitioner, which said tax amounted to two hundred dollars, and that such tax was paid by the petitioner to the Treasurer of the Commonwealth, but the respondent denies that said tax was exacted as a condition of the petitioner's being allowed to do interstate business in this Commonwealth, but says that it was exacted as a charge for the privilege of maintaining a usual place of business in the Commonwealth for the uses of domestic business and as a condition upon the right to maintain such place of business and transact such domestic business, and the respondent denies that said tax was unlawfully assessed, imposed, and exacted, and denies that the petitioner is entitled to recover said tax.

17 8. That in reply to the paragraph numbered 8 of said petition, the respondent denies each and every allegation therein contained.

9. The respondent denies each and every allegation of the petition except such as have been herein specifically admitted.

COMMONWEALTH OF MASSACHUSETTS,
By JAMES M. SWIFT, *Attorney-General.*
ANDREW MARSHALL,
Assistant Attorney-General.

And said petitioner thereupon, on the first day of January, A. D. Nineteen hundred and twelve, filed its replication to said answer, as follows:

18 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

In Equity. No. —.

S. S. WHITE DENTAL MANUFACTURING COMPANY, Petitioner.
v.
COMMONWEALTH OF MASSACHUSETTS, Respondent.

Replication.

Now comes the petitioner in the above entitled suit, and joins issue on the Respondent's answer.

By Its Solicitors and Counsel, CHAS. A. SNOW.
J. H. KNIGHT.
WM. P. EVERTS.

And on the second day of said January the parties appeared, and filed their Agreed Statement of Facts, as follows, viz:

19 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

In Equity.

S. S. WHITE DENTAL MANUFACTURING COMPANY, Petitioner.
v.
COMMONWEALTH OF MASSACHUSETTS, Respondent.

Agreed Statement of Facts.

It is hereby agreed by and between the parties in this cause that for the purposes of this cause the following facts shall be taken as true, and that the court shall be at liberty to draw inferences of fact from the facts hereinafter stated:

The S. S. White Dental Manufacturing Company, the petitioner herein, is a foreign corporation established under the laws of Pennsylvania and engaged in the business of manufacturing and selling artificial teeth and dental instruments, apparatus and supplies of every description and of buying and selling products of a similar description of other manufacturers and dealers.

At the date of the filing of this petition the petitioner's total authorized capital was of the par value of one million dollars, consisting of ten thousand shares of the par value of one hundred dollars each, all of which shares were then issued and outstanding.

The petitioner's statutory, principal office and offices of its Presi-

dent and Treasurer are in Philadelphia, where the meetings of its directors and stockholders are held.

20 The petitioner maintains a usual place of business in Boston, within this Commonwealth, which consists of large salesrooms, stock rooms, offices and store rooms, which it occupies under lease at No. 120 Boylston Street. At this place of business the petitioner keeps a stock of goods sufficient for carrying on business, which is displayed for sale in showcases, on counters and shelves and on the floor, so far as is possible, the balance of the stock being kept in storerooms in the same building with the salesrooms. At this place of business books are kept, a New England manager or sales agent is in control, and fifty-four persons are employed, twelve of whom are traveling salesmen who travel through Massachusetts and all the New England states, except Connecticut, and through the Maritime Provinces, and send orders received by them to the Boston office for acceptance.

The stock on hand at the Boston place of business of the petitioner, the fixtures in said place of business and the current bank deposits constitute all the tangible property of the petitioner which is located in Massachusetts, and the average value of said property located in Massachusetts is about one hundred thousand dollars.

The petitioner does not manufacture goods within the Commonwealth of Massachusetts.

At its Boston place of business the petitioner sells over the counter goods from its Boston stock, both at wholesale and retail, and also sells goods from the stock in its Boston store to the Dental trade and other persons, for delivery by messenger, mail and express within the borders of Massachusetts. About fifty per cent

21 of the goods sold from the stock on hand at the Boston store are sold to persons residing within Massachusetts. Sale is made at the Boston place of business from the stock of goods on hand at said place of business of about an equal quantity of goods for delivery to purchasers residing or having their place of business outside of Massachusetts in all the New England states, except Connecticut, and in the Maritime Provinces.

In cases of sales from the Boston stock for delivery other than over the counter or by mail or messenger, either within or outside of the Commonwealth of Massachusetts, the goods are billed directly from the Boston salesrooms to the purchaser, the petitioner receiving a bill of lading in which the purchaser of the goods is described as the consignee and the petitioner as the consignor. The petitioner then forwards by mail the bill of lading so received to the consignee, to whom the goods are delivered by the railroad or express company upon presentation of the bill of lading.

At the Boston place of business, also, orders are accepted and contracts made by the petitioner for the sale of goods to be delivered, not from the Boston stock but from the company's Pennsylvania or New York factories. In such cases the Boston office, after accepting an order received from one of its twelve salesmen traveling through New England or the Maritime Provinces, sends the order or requisi-

tion to the company's principal office in Pennsylvania, with the direction that the goods purchased be forwarded and delivered to the purchaser, pursuant to the contract of sale, at the purchaser's place of business, wherever it may be located. The goods are loaded at the Pennsylvania or New York factory of the petitioner, car-
22 ried to the freight depot, billed to the purchaser as consignee and delivered to the railroad for transportation, and delivered direct to the purchaser at his place of business in whatever state he is located.

Except in cases of such intrastate deliveries as can be made by messenger the petitioner itself does not transport for delivery its goods, but such transportation is made by railroads or other public carriers.

In addition to the places of business in Pennsylvania and Massachusetts the petitioner maintain- fourteen other places of business, which are located in New York and other states.

A large percentage of the petitioner's total sales require for delivery the shipment and transportation by carriers of goods from the Pennsylvania and New York factories into and through one or more other states before reaching the purchaser.

Approximately ten per cent of the total sales made by the petitioner throughout this country and other countries are made in Massachusetts, approximately one-half of the sales made in Massachusetts being for delivery to purchasers residing in Massachusetts, and approximately one-half thereof being for delivery to purchasers residing outside of Massachusetts.

The petitioner's total assets and liabilities, may for the purposes of this case be taken to be, as shown by its last annual return rendered to the Commonwealth of Massachusetts, filed pursuant to the requirements of the corporation laws of Massachusetts, as follows:

23

Assets.

April 25, 1911.

Real Estate	$771,951.05
Machinery and fixtures	728,407.52
Merchandise:	
manufactures, merchandise, material	1,755,450.81
and stock in process	762,747.52
Cash and debts receivable	1,165,272.01
Patent rights	35,000.00
Sinking fund	192,889.38
Goodwill, investment	300,000.00
	$5,711,718.29

Liabilities.

Capital stock	$1,000,000.00
Accounts payable	62,354.74
Funded indebtedness	200,000.00
Floating indebtedness	75,000.00
Surplus	4,324,363.55
Fund to off-set bad debts	50,000.00
	$5,711,718.29

The petitioner was duly admitted to do business in Massachusetts, pursuant to the business corporation laws of Massachusetts, St. 1903, c. 437, §§58 and 60, and their amendments, having complied with the requirements of said sections. It has accordingly for at least ten years maintained a place of business in Boston for the purposes aforesaid, has paid the said taxes assessed upon it by the Commonwealth during those years, and complied with the requirements of the departments of the Commonwealth of Massachusetts under the corporation laws.

24 On the 6th day of May, 1911, the petitioner paid to the Commonwealth an excise tax assessed upon it by the Tax Commissioner of the Commonwealth, under the provisions of St. 1909, c. 490, part III, §56, which was measured by one-fiftieth of one per cent of the petitioner's total authorized capital stock, and amounted to two hundred dollars.

JAMES M. SWIFT,
Attorney General.
By ANDREW MARSHALL,
Assistant Attorney General.
For the Commonwealth of Massachusetts.
CHARLES A. SNOW,
JOSEPH H. KNIGHT,
(Per C. A. S.)
WM. C. EVERTS,
Attorneys for Petitioner.

And petitioner also filed his request for rulings, etc., as follows, viz:

25 COMMONWEALTH OF MASSACHUSETTS.
Suffolk, ss:

Supreme Judicial Court.

In Equity. No. —.

S. S. WHITE DENTAL MANUFACTURING COMPANY, Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS, Respondent.

Petitioner's Requests for Rulings.

1. Section 56 of Part III of Chapter 490 of the Acts of 1909 of the Commonwealth of Massachusetts, is unconstitutional and void under the Federal Constitution, so far as concerns this petitioner, because it imposes an unlawful tax and burden upon and *and* regulation of interstate commerce in contravention of the "commerce" clause contained in Section 8 of Article 1 of the Federal Constitution.

2. The said Section 56 is unconstitutional and void under the Federal Constitution, because it is in conflict with the "due process

of law" clause contained in the Fourteenth Amendment to the Federal Constitution.

3. The said Section 56 is unconstitutional and void under the Federal Constitution because in conflict with the "equal protection of the laws" clause contained in the Fourteenth Amendment
26 to the Federal Constitution.

4. Section 56 of Part III of Chapter 490 of the Acts of 1909 of Massachusetts is unconstitutional and void under the "commerce" clause of the Federal Constitution, with respect to all foreign corporations, including the petitioner, which are to any substantial extent engaged in interstate commerce, and which maintain an office or a usual place of business in Massachusetts, for the sale or delivery of their products or goods, at or through which office or place of business are conducted sales of goods involving interstate commerce as well as sales involving purely local or intrastate commerce, and which are maintained partly for the purpose of interstate commerce and partly for intrastate commerce, because the said Section 56 requires payment by such foreign corporations, including the petitioner, of an excise tax of a given per cent of the total authorized capital stock of such corporations, based in effect on all their property, capital, business and interests everywhere, including both their interstate and their instrastate business, commerce and property, and thereby imposes a burden on the interstate portion of the commerce and business of such corporation, thus constituting an unlawful regulation of interstate commerce in contravention of the "commerce" clause contained in Section 8 of Article 1 of the Federal Constitution.

5. The decision of the Supreme Court of the United States in the Western Union and Pullman cases (216 U. S. 1, 56) govern the decision of this case. In accordance with the principles there established the Massachusetts excise tax is unconstitutional
27 as applied to any foreign corporation which maintains a Massachusetts place of business partly for the purposes of interstate commerce and partly for domestic or intrastate commerce, or maintains such place of business for the purpose of interstate sales of goods in connection with intrastate sales. So long as it appears that some substantial portion of the sales or business conducted in Massachusetts is interstate commerce, the following considerations are immaterial factors, namely:—

(*a*) Whether or not the principal part of the business conducted in Massachusetts is interstate commerce.

(*b*) Whether or not the corporation is engaged in a transportation business or is "conducting some kind of interstate commerce for hire as its principal function."

(*c*) Whether or not it is engaged in intrastate business "so closely connected with the interstate commerce that it could not be given up without serious detriment to the interstate commerce."

6. That upon the allegations of the petition and the agreed facts it must be ruled as matter of law that sales or contracts for the sale of goods manufactured or located in one State for delivery in other States, constitute interstate commerce, or transactions involving

interstate commerce, irrespective of the fact that the transportation or delivery of such goods is performed by common carriers. The goods covered by such sales or contracts of sale are subjects of interstate commerce. The business of selling the same involves
28 interstate commerce. The place of business or office where such sales are made or negotiated or deliveries thereunder superintended, is one of the means or instrumentalities of interstate commerce. Such sales or contracts of sale, the goods sold thereunder, the business of selling them and the office or place of business where sold are each and all under the protection of the "commerce clause" of the Federal Constitution, regardless of the question whether the seller is a transportation company or common carrier. Transportation and delivery are merely means or instrumentalities of interstate commerce. A company merely selling goods for delivery in other States is engaged in interstate commerce.

7. Section 56 of Part III of Chapter 480 of the Acts of 1909 of Massachusetts, as applied to foreign corporations, including the petitioner, which have real estate and other property situated wholly outside of Massachusetts, is unconstitutional and void under the Federal Constitution, because subjecting their property situated outside of Massachusetts to taxation, and in undertaking to make the payment of a tax upon property beyond the borders of the State a condition of retaining or securing the right to transact local or intrastate business within the limits of Massachusetts, and in thus depriving them of their property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

8. This excise tax is unconstitutional and void because it violates the "equal protection of the laws" clause of the Fourteenth Amendment, in that it creates an arbitrary and unreasonable classi-
29 fication between foreign corporations on the one hand and domestic corporations transacting the same kind of business on the other hand, taxing the former by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege.

9. Upon all the evidence the petitioner is entitled to recover the amount of the excise tax imposed upon it with interest.

CHARLES A. SNOW,
JOSEPH H. KNIGHT,
(Per C. A. S.,)
WM. P. EVERTS,
Attorneys for Petitioner.

And on said second day of January A. D. Nineteen hundred and twelve, after a hearing upon the pleadings and Agreed Facts and the request for rulings of law, the cause was reported by the presiding Justice (Braley, J.) for the determination of the Full Court, in the words following, to wit:

30 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

In Equity. No. —.

S. S. WHITE DENTAL MANUFACTURING COMPANY, Petitioner.
v.
COMMONWEALTH OF MASSACHUSETTS, Respondent.

Report.

The above entitled cause was heard before me upon the pleadings, the facts agreed upon by counsel, and the requests for rulings of law made by the petitioner. I refused all of said requests, and ordered the petition dismissed.

At the request of the petitioner, I report the case for the consideration of the full Court. If my rulings were correct, a decree to be entered dismissing the petition; otherwise, a decree to be entered for the petitioner in the sum of Two hundred (200) Dollars, with interest from the date of payment of said excise tax and costs.

HENRY K. BRALEY,
Justice of the Supreme Judicial Court.

Jan'y 2, 1912.

And afterwards, to wit, on the twenty-fourth day of May A. D. Nineteen Hundred and Twelve, it was ordered by our said Supreme Judicial Court for the Commonwealth, as follows, viz:

31 COMMONWEALTH OF MASSACHUSETTS:

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH, AT BOSTON, *May* 24, 1912.

In the case of S. S. White Dental Manufacturing Company vs. Commonwealth of Massachusetts pending in the Supreme Judicial Court for the County of Suffolk:

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.:— Petition Dismissed with costs.

By the court,

C. H. COOPER, *Clerk.*

May 24, 1912.

32 And said rescript was entered by our said Court accordingly.

Whereupon the parties appeared, and further hearing being had upon the rescript the following Final Decree was entered by our said Court, viz:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

In Equity. No. 17364.

S. S. WHITE DENTAL MANUFACTURING COMPANY, Petitioner,
vs.
COMMONWEALTH OF MASSACHUSETTS, Respondent.

Final Decree.

This cause came on to be further heard after rescript from the full Court, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the petition in the above entitled suit be and is hereby dismissed with costs, taxed in the sum of Thirty-five (35) Dollars.

By the Court,

JOHN H. FLYNN,
Ass't Clerk.

July 5, 1912.

Which Final Decree was assented to in writing thereon by the petitioner as follows:

"Assented to by

S. S. WHITE DENTAL CO.
WM. C. EVERTS."

33 All and singular which premises we have held good, by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the Seal of our said Court to be hereto affixed.

Witness, Arthur P. Rugg, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston in said County, on this thirtieth day of September, in the year of our Lord One thousand nine hundred and twelve.

[SEAL.] JOHN F. CRONIN, *Clerk.*

34 & 35 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *September* 16, 1912.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of S. S. White Dental Manuf. Co. vs. Commonwealth decided on the 24th day of May, 1912.

HENRY WALTON SWIFT,
Reporter of Decisions.

35½ RUGG, *C. J.*:

The petitioner is a foreign corporation organized under the laws of Pennsylvania, where are its principal offices. Its business is manufacturing artificial teeth and dental instruments and supplies and buying and selling such products. It does not manufacture in Massachusetts, but it has maintained for ten years in Boston a sales-room, offices, store and stock rooms, where it keeps a stock of goods sufficient for carrying on its business. At this place fifty-four persons are employed, twelve of whom are salesmen travelling in New England and the maritime provinces. It sells goods at wholesale and retail over its counters. About fifty per cent of its sales at the Boston place of business are to persons residing in Massachusetts. Sales of nearly an equal quantity are made there for delivery to purchasers outside of Massachusetts. Goods so sold
36 are not transported by the petitioner, but by common carriers, the petitioner receiving a bill of lading, in which it is named as consignor and the purchaser as consignee. The bill of lading is mailed to the consignee, who, upon its surrender to the carrier, receives the goods. Other orders are received at the Boston office, which are filled by deliveries from factories of the petitioner in other States. Approximately ten per cent of the total sales of the petitioner are made in Massachusetts, one half of this percentage being to residents of Massachusetts, and one half to purchasers residing outside of Massachusetts. The petitioner's authorized and issued capital stock is $1,000,000. Its stock on hand, fixtures and bank deposits in Boston average $100,000. For the year 1911 the petitioner paid to the Commonwealth an excise under St. 1909, c. 490, Part III, s. 56, which was measured by one-fiftieth of one per cent of the petitioner's authorized capital stock, and amounted to $200. This petition is brought to recover the excise so paid.

The several grounds of this claim by the petitioner relate to the constitutionality of the excise on foreign corporations for doing business in the Commonwealth provided by St. 1909, c. 490, Part III, s. 56, and may be grouped as follows: 1. That it imposes an unlawful burden on interstate commerce. 2. That it takes property without due process of law. 3. That it violates the requirement for equal protection of the law.

The constitutionality of this statute was before this court first in Attorney General v. Electric Storage Battery Co. 188 Mass.
37 239. There it was held as not intended to apply to foreign corporations having places of business in this Commonwealth devoted exclusively to interstate business, and, as so interpreted, "plainly constitutional." In Baltic Mining Co. v. Commonwealth, 207 Mass. 381, its constitutionality was discussed again. In behalf of the petitioner there it was urged that Western Union Telegraph Co. v. Kansas, 216 U. S. 1, and Pullman Co. v. Kansas, 216 U. S. 56, required an overruling of Attorney General v. Electric Storage Battery Co., but it was held in an exhaustive opinion of the court, speaking through Chief Justice Knowlton, that our statute was not

governed by these decisions, and was constitutional notwithstanding them. We are asked to review and overrule these two decisions of our own, by reason of further recent decisions of the United States Supreme Court. The material part of the statute is that a foreign corporation is required to pay an annual excise of "one-fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

1. It is urged, first, that this is not really an excise, but a property tax upon all the property of the petitioner as represented by its capital stock, and hence a direct burden upon interstate commerce.

38 Before examining the federal cases relied upon by the petitioner, a reference to the nature of our system of exacting revenue from corporations will be helpful, for the purpose of determining whether the tax is what the Legislature called it, namely, an excise, or whether it is a property tax, as is now contended. Under our Constitution, which has been the organic law of this Commonwealth since 1780, taxes are of two kinds, property taxes and excises. The first of these must be both proportional and reasonable. The latter need not be proportional, but only reasonable. This distinction has been marked often in legislation, and defined somewhat in judicial decision. It was said in 1815, by Chief Justice Parker, in Portland Bank v. Apthorp, 12 Mass. 252, 255: "Those taxes [that is, those upon property] must be proportional upon all the inhabitants of, and persons resident and estates lying within, the Commonwealth. The exercise of this power requires an estimate or valuation of all the property in the Commonwealth; and then an assessment upon each individual, according to his proportion of that property. To select any individual or company, or any specific article of property, and assess them by themselves, would be a violation of this provision of the Constitution. But there are other sources of emolument and profit, not strictly called property, but which are rather to be considered as the means of acquiring property, from which a reasonable revenue may be exacted by the Legislature. * * * The exercise of this power is called the imposing or levying of duties and excises."

39 The broad power of levying excises has arisen from the grant to the Legislature in the Constitution to impose them upon [among other subjects] any "commodities" within the Commonwealth. This word is of comprehensive signification, and includes the privilege of transacting business as a corporation, whether domestic or foreign, within the Commonwealth. Commonwealth v. Lancaster Savings Bank, 123 Mass. 493, 495.

It has been said many times, through the years since the adoption of the Constitution, that any property tax in order to be valid under the Constitution must be proportional, and any such tax assessed upon certain property, at a rate different from that upon other property, is disproportionate. Oliver v. Washington Mills, 11 Allen, 268, 275. Cheshire v. County Commissioners, 118 Mass. 386, 389.

Northampton v. County Commissioners, 145 Mass. 108, 109. Opinion of the Justices, 195 Mass. 607. Opinion of the Justices, 208 Mass. 616. The policy of the Commonwealth relative to the taxation of corporations, both domestic and foreign, has been founded upon this distinction between a property tax and an excise. It was established in 1862 as to savings banks, and in 1864 as to business corporations. The constitutionality of these acts was attacked. The excise upon the commodity of exercising the business of a savings bank was based upon the amount of its deposits, and upon
40 that of being a business corporation on the market value of its capital stock after deducting its real estate and machinery, if any, taxed locally.

These excises were sustained as valid, on the ground that they were not property taxes. Commonwealth v. People's Five Cents Savings Bank, 5 Allen, 428. Commonwealth v. Provident Institution for Savings, 12 Allen, 312. Commonwealth v. Hamilton Manuf. Co. 12 Allen, 298. In the last two cases, the constitutionality of the statutes was assailed on the further ground that each corporation had a substantial part of its assets invested in bonds of the United States which were exempt from taxation under the Constitution of the United States. It was urged with great earnestness that an excise was unconstitutional which was based, in one case, upon the amount of deposits, a large part of which was invested in United States bonds, and in the other upon market value of shares deriving a material and ascertainable part of their value from the ownership of such bonds. On this ground each case was taken to the Supreme Court of the United States. Provident Institution v. Massachusetts, 6 Wall. 611. Hamilton Co. v. Massachusetts, 6 Wall. 632. In the opinion in the latter case, it was said at pages 639, 640: "Separated from the peculiar provision of the State Constitution, and the long practice under the original decision [Portland Bank v. Apthorp, 12 Mass. 252] the present decision of the State court upon the subject might well be criticised as founded in unsubstantial distinc-
41 tions, but when weighed as an exposition of that peculiar clause and in view of the long practice of the State, commencing long before the prior decision was made, it is not possible to withhold from the conclusion a full and unqualified concurrence. * * * Property taxation and excise taxation, as authorized in the Constitution of the State, are perfectly distinct, and the two systems are easily distinguished from each other, if we adopt the definition of the word 'commodities' as uniformly given by the courts of the State, and as universally understood by the taxpayers and assessors." Society for Savings v. Coite, 6 Wall. 594. The Legislature has applied the principle of an excise to telegraph and telephone companies, whether foreign or domestic, operating lines partly within and partly without the State, and these, though differing in the mode of ascertainment from the one now under consideration, have been upheld. Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530. Massachusetts v. Western Union Telegraph Co. 141 U. S. 40. Similar statutes have been enacted respecting excises upon corporations operating railroads, street railways, electric railroads,

and express companies. St. 1909, c. 490, Part III, ss. 40, 41, 43, 52, 72, 76. It has been applied to foreign insurance companies. Oliver v. Liverpool & London Life & Fire Ins. Co. 100 Mass. 531. Connecticut Mutual Life Ins. Co. v. Commonwealth, 133 Mass. 161.

The principle of imposing an excise upon the privilege of doing business within this State by a foreign mining, quarrying or
42 oil corporation, based upon a percentage of the par value of its capital stock, was established by St. 1865, c. 283, s. 8. This was held a valid excise under both the State and Federal Constitutions in Attorney General v. Bay State Mining Co. 99 Mass. 148, where it was said, at page 153: "But it is not merely the franchise of incorporation that is the basis of the tax; nor is it the capital regarded merely as property. * * * A corporation which seeks, by its agents, to establish a domicil of business in a state other than that of its creation, must take that domicil, as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there."

Thus it appears that for nearly one hundred years this court has sustained as constitutional excises upon corporations which could not have been upheld as property taxes under the terms of our Constitution. The conclusion is irresistible that the Legislature intended the financial burden now under discussion to be an excise. It is expressly declared by the terms of the statute to be an excise. The declared purpose of the act is to be accepted as true, unless incompatible with its meaning and effect. Hazen v. Essex Co. 12 Cush. 475, 477. Flint v. Stone Tracy Co. 220 U. S. 107, 145. It was said in Baltic Mining Co. v. Commonwealth, 207 Mass. at 388, that "The required payment is strictly of an excise tax, and not of a tax upon property * * * This excise tax is for the commodity or privilege of having an establishment for business in
43 Massachusetts with the protection of our laws and the financial and other advantages of a situation here." Pratt v. Street Commissioners, 139 Mass. 559, 561, 562. Commonwealth v. Barnstable Savings Bank, 126 Mass. 526. Suffolk Savings Bank for Seamen, petitioner, 151 Mass. 103, 106. Attorney General v. Massachusetts Pipe Line Gas Co. 179 Mass. 15, 19. Greenfield Savings Bank v. Commonwealth, 211 Mass. 207.

It is apparent from this review that for many years the established policy of this Commonwealth has exacted revenue from all domestic corporations, chiefly by a system of excises, and not by property taxes. While, as has been pointed out, limited classes of foreign corporations had been taxed in the same way, those engaged in ordinary business and manufacturing had not been required until 1903 to pay any excise, and had been subject only to a limited property tax upon such real estate and goods, wares and merchandises as were within the State. Under this condition of the law, foreign corporations engaged in ordinary trade enjoyed distinct immunities over domestic corporations. Boston Investment Co. v. Boston, 158 Mass. 461. When the Legislature dealt with the subject of foreign corporations in the light of Massachusetts history and experience, it levied an excise, as it had for many years upon all domestic

corporations. By St. 1903, c. 437, s. 75, foreign corporations organized for purposes for which domestic corporations may be established under that statute were required to pay annually an
44 excise as a condition for doing business within the Commonwealth. This statute subjected to its provisions all foreign corporations having a usual place of business in the Commonwealth or engaged without a usual place of business in the construction, alteration, erection or repair of a building, railroad, bridge or structure of any kind, save as other special provision was made. Speaking generally, such corporations included those engaged in ordinary mercantile or manufacturing business, but excluded transportation and public service corporations of all kinds, and banking, trust, surety and indemnity companies. It has been decided expressly so often as to be plain beyond the possibility of dispute, that there is a clear distinction between a property tax on the assets or capital of a corporation and an excise or license for the privilege of carrying on business. For example, it was said in Hamilton Co. v. Massachusetts, 6 Wall. 632, 640, "Property taxation and excise taxation * * * are perfectly distinct."

This tax then must be regarded in the light of our taxation history and system as intended by the Legislature and interpreted by the courts as a pure excise tax. Upon no other ground could it be sustained under our own Constitution. In no sense can it be regarded under our jurisprudence as a property tax. It is said, however, that the law is unconstitutional as an interference with interstate commerce, under the decisions of Western Union Telegraph Co. v. Kansas, 216 U. S. 1, Pullman Co. v. Kansas, 216
45 U. S. 56, Ludwig v. Western Union Telegraph Co. 216 U. S. 146, and Western Union Telegraph Co. v. Andrews, 216 U. S. 165. To these should be added Atchison, Topeka & Santa Fe Railway v. O'Connor, 223 U. S. 280, and Oklahoma v. Wells, Fargo & Co. 223 U. S. 298, decided since the argument. The principle established by these decisions is that the court, looking through the form of a statute to its substance, will ascertain whether in truth the impost is a direct tax upon interstate commerce, whatever may be the guise under which it is levied, and applying this rule, statutes under consideration in each of these cases requiring of all foreign corporations payment of a certain percentage of their entire capital stock were found to be a direct burden upon that portion of the corporate capital engaged in interstate commerce, and hence void. There are at least two important, and as we think vital, distinctions between these cases and the one at bar. The first is that these cases all relate to corporations directly engaged for hire in transportation of intelligence or commerce or persons between the States; and their capital invested in this business was of such a permanent and fixed nature that the local business could not be given up without impairing their capacity to transact efficiently their interstate business. Their main business was interstate commerce of a quasi public character. Our statutes now deal, and have always dealt with corporations of this character on a basis entirely different from that established respecting ordinary business corporations. See St. 1909,

c. 490, Part III, s. s. 40, 41, 43, 52, 72, and 76, and St. 1912,
46 c. 457. Cases like these federal decisions could not arise under our scheme of taxation. The second distinction between our statute and those under consideration in the federal cases last cited, is that the maximum fee allowed by our statute is $2,000, which is the fee exacted of corporations having a capital of $10,000,000 or more. This provision demonstrates that it is not a property tax, but only an excise so limited that it cannot reach beyond a reasonable license fee. These differences appear on the face of our statute, when compared with those under review in the federal decisions. Its substance appears to be that which it is denominated, namely, an excise. But light is thrown upon its real effect by the interpretation placed upon it by this court. Attorney General v. Electric Storage Battery Co. 188 Mass. 239, held that our statute did not relate to foreign corporations doing exclusively an interstate commerce, while Baltic Mining Co. v. Commonwealth, 207 Mass. 381, 390, decided that it did not apply "to a foreign corporation for the taxation of which there is no special provision in our statutes, if it should be engaged in the work of conducting some kind of interstate commerce for hire as its principal function, and at the same time should be engaged in intrastate business so closely connected with the interstate commerce that it could not be given up without serious detriment to the interstate commerce, so that its condition in this respect would be like that of the Western Union Telegraph Company."

It follows that our statute applies to corporations engaged
47 in the transaction of ordinary business within the State. It comes precisely within the statement of law in Western Union Telegraph Co. v. Kansas, 216 U. S. 1, made by the court speaking through Mr. Justice Harlan, at page 33: "It is true that in many cases the general rule has been laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people. But those were cases in which the particular foreign corporation before the court was engaged in ordinary business and not directly or regularly in interstate or foreign commerce." This principle is supported by a great number of cases, many of which are cited in other parts of this opinion. It is established in its application to the case at bar especially by Osborne v. Florida, 164 U. S. 650, 655, Horn Silver Mining Co. v. New York, 143 U. S. 305, Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, Cooper Manuf. Co. v. Ferguson, 113 U. S. 727, Hammond Packing Co. v. Arkansas, 212 U. S. 322, 343. None of these cases are overruled or impaired by the opinion in Western Union Telegraph Co. v. Kansas, and some of them are affirmed by it.

The effect of our statute is to establish a maximum excise of $2,000 as a license for doing business in this State. It is a condition exacted annually as a prerequisite to conducting a local
48 business here. It is the manner in which a fee is determined and levied for the gift of a function from the State, which

it is at full liberty to deny or bestow. If the sovereignty confers the gift, it may fix its own conditions. This is in itself a reasonable sum. It does not exceed the amount which may be charged for an annual license to sell intoxicating liquors. A flat rate of $2,000 might have been charged all foreign business corporations without violation of any right guaranteed by the Constitution of the United States. The present statute graduates the fee down from that maximum. That in this regard it imposes a diminished burden upon the smaller corporation is not fatal. The gauge of this reduction is not the value of the property of the corporation, nor the actual value of its shares, but the par value of its capital stock. This fact, in conjunction with the comparatively small maximum established, is another indication that the excise cannot be a property tax. Reference to the par value of the capital stock in such connection "is made, not as descriptive of the subject to be assessed." Provident Institution v. Massachusetts, 6 Wall. 611, 627. The circumstance that the amount of the excise is not "unduly great, having reference to the real value" of property engaged in business (United States Express Co. v. Minnesota, 223 U. S. 335, 348) or that it "is not at all disproportioned to such local business and, therefore, not to be regarded as a mere device to reach or burden the interstate commerce of the company" (Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 42) have been treated as significant factors in determining whether the statute was within the power of the State.

49 It seems plain from the agreed facts that there is in a legal sense no inextricable connection between the interstate and intrastate business of the petitioner. They are not so interwoven that they cannot be separated reasonably. The petitioner alleges that parts of its property, assets and place of business "in no way concern" its domestic business or "have no material reference" to it. The agreed facts as interpreted by the petitioner show a differentiation in amount. Indeed, this appears to be a necessary incident to ordinary business. Otherwise, every kind of business, when both interstate and domestic are conducted, merely by reason of commingling, might be regarded as inseparable. Unless this is so, any discussion of excise taxes on foreign corporations would be idle, for they could all be avoided by conducting an interstate and domestic business at the same place. Simply because the interstate and intrastate business may be conducted together more profitably or conveniently does not render them inextricably interwoven, nor the one necessarily incident to the other. Therefore, it is not necessary to define the principle which would govern under such circumstances.

The petitioner comes within the description contained in Pullman Co. v. Adams, 189 U. S. 420, 422. "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce," and as was said in Allen v. Pullman's Palace Car Co. 191 U. S. 171, 182, it may "abandon the business if it

50 saw fit," or in Kehrer v. Stewart, 197 U. S. 60, 67, "if the tax be imposed in terms upon the domestic commerce, * * * the corporation is free to abandon the business taxed if it sees fit." In Galveston, Harrisburg & San Antonio Railway v. Texas, 210

U. S. 217, at 227, it was said referring to the distinction between the right of the State to tax property [and by implication of its right to levy an excise or license] and in its incapacity to tax interstate business "The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. * * * A practical line can be drawn by taking the whole scheme of taxation into account." Our corporation tax system, in the light of its history, bears this test. It is a scheme of taxation which is founded wholly upon the proposition as its corner stone that it is not a property but an excise tax. This is its only support, and it falls utterly if this fails. As was said by Chief Justice Holmes, in Tremont & Suffolk Mills v. Lowell, 178 Mass. 469, at 471, "The franchise tax is not a tax on the property of the corporation, and its validity sometimes has depended upon this consideration." This system of taxation has grown up under the shelter of two express decisions in its support by the Supreme Court of the United States. Provident Institution v. Massachusetts, 6 Wall. 611, and Hamilton Co. v. Massachusetts, 6 Wall. 632. These have both been cited with approval in Flint v. Stone Tracy Co. 220 U. S. 107, 164, 165, 167. It cannot be thought that there was any intent in the cases upon which
51 the petitioner relies to overrule these cases or to destroy a system of taxation which so far as its federal aspects are concerned has been built upon faith in them. See the language of Holmes, C. J., in Smith v. Mayor and Aldermen of Worcester, 182 Mass. 232, 233. As a practical matter, there is no attempt to burden interstate commerce. It is only by an attempted extension of the principle of Western Union Telegraph Co. v. Kansas and the cases following it beyond its tensile strength that it even appears to reach the case at bar.

The result is that the petitioner may carry on its interstate business alone if it chooses without paying the excise, but if it prefers to exercise the commodity of doing a local business in our State, availing itself thus of our business and financial advantages and competing for domestic business under the protection of our laws, it must do so in accordance with those laws. Treating the statute as to substance and operation, it does not bear directly upon commerce among the States, nor amount to a regulation of it. Without repeating the reasoning of Baltic Mining Co. v. Commonwealth, we adhere to it, and find nothing at variance with its conclusions in the recent decisions of the United States Supreme Court.

We have not discussed the point much relied upon by the Commonwealth that a close analysis of the facts shows that a large percentage of the petitioner's business conducted in Boston is intrastate, and only a very small fraction interstate, for we reach our decision assuming that the proportions asserted by the petitioner in this regard are correct.

52 2. The grounds already discussed and the conclusions reached dispose of the contention that the statute takes property of the petitioner without due process of law. If the money payment required is an excise exacted solely for the privilege of conducting a domestic business within the State, a privilege which

the petitioner is free to embrace or renounce, as we hold it to be, it follows that the petitioner, when voluntarily it took such steps as subjected it to an excise within the constitutional power of the State to exact, has not been deprived of its property except by the law of the land. See Southwestern Oil Co. v. Texas, 217 U. S. 114.

3. It is urged that the excise law is invalid because contrary to the clause of the Fourteenth Amendment to the Federal Constitution inhibiting any State from denying "to any person within its jurisdiction the equal protection of the laws." Reliance in this respect is placed upon Southern Railway v. Greene, 216 U. S. 400, and Louisville & Nashville Railroad v. Gaston, 216 U. S. 418. These cases seem clearly distinguishable from the case at bar. They each relate to a railroad corporation which, as said in the opinion in Southern Railway v. Greene, at 414, came into the State with its "permission * * * and under the sanction of its laws, and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property,
53 which the foreign corporation has acquired under the permission and sanction of the laws of the State * * * It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors * * * The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed." The ground of the judgment in the cases relied upon is the feature of acquisition of property in its nature permanent, irremovable and inadaptable to other purposes, upon the faith of an existing law of the State. This principle does not affect or modify that other principle established by a long line of decisions that a State has an absolute and unqualified right to utterly prohibit or prescribe and change at will the terms upon which a foreign corporation, strictly commercial in its nature, may be permitted to do business within its borders. Bank of Augusta v. Earle, 13 Pet. 519. Ashley v. Ryan, 153 U. S. 436, 445. Waters-Pierce Oil Co. v. Texas, 177 U. S. 28. Snyder v. Bettman, 190 U. S. 249. Home Savings Bank v. Des Moines, 205 U. S. 503, 516. This point is quite disconnected with that of interstate commerce, and hence decisions on statutes touching insurance companies are pertinent. Paul v. Virginia, 8 Wall. 168. Hooper v. California, 155 U. S. 648, 652. Philadelphia Fire Association v. New York, 119 U. S. 110. Home Ins. Co. v. New York, 134 U. S. 594. Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, 249, and other cases there cited. The law upon this subject, as stated by Mr. Justice Peckham, in the case last cited, at 257, is: "Thus it is admitted that a State has power to pre-
54 vent a company from coming into its domain, and that it has power to take away its right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives." There is nothing in this record to indicate a large and permanent investment by the petitioner in property adapted to its peculiar needs and not equally available at an equivalent or reasonable price for other valuable uses. The fact that it

has leased a store has no tendency by itself alone in this direction Moreover, there is nothing in the agreed facts or in the allegations of the petition to indicate that the operation of our system of tax laws as a whole is adverse to the foreign corporation as compared with others in like situation conducting business as individuals, partner-hips or domestic corporations. An inspection of the law itself is far from showing any legislative hostility to foreign corporations as such, or the imposition of onerous burdens upon them, or that the excise law in its broader aspects and in its practical working is in any respect unjust or unequal.

It is a further significant circumstance that our statutes have never placed foreign and domestic corporations upon literally the same basis as to excises. An examination of the history of our statute law in this regard will show that for many years the foreign business corporation stood upon a ground distinctly more favorable than did domestic competitors. Boston Investment Co. v. Boston, 158 Mass. 461. New York Biscuit Co. v. Cambridge, 161 Mass. 326. New England & Savannah Steamship Co. v. Commonwealth, 195 Mass. 385, 388, 389. It surely cannot be the law that all efforts at
55 equalization of the burdens of government are impossible and unlawful, for the reason that those who have heretofore enjoyed an undue advantage may be deprived of their preference. Looking at the two reports of special committees which were before the Legislature at the time of the enactment of St. 1903, c. 437, and St. 1909, c. 490, it is open to doubt whether our laws may not still discriminate in favor of the foreign business corporation against similar domestic corporations. The report of the Joint Special Committee on Texation of 1907, which formed the basis of St. 1909, c. 490, in referring to the excise tax on foreign corporations provided by St. 1903, c. 437, s. 75, said: "It seems clear * * * that the amount received from this excise tax is entirely inadequate to pay for the privileges enjoyed * * *. The fact that domestic corporations frequently find it to their financial advantage to give up their Massachusetts charters and become incorporated under the laws of some State other than Massachusetts inevitably leads to the conclusion that there is at present a discrimination in the matter of taxation against our own corporations and in favor of foreign enterprise." What this committee deemed a conservative recommendation is not, however, embodied in the existing law, but one in some respects more favorable to the foreign corporation. For these reasons there are ample distinctions between Southern Railway v. Greene and Louisville & Nashville Railroad v. Gaston and the case at bar. License or privilege fees are not taxation, and under the
56 cases above cited may be limited to foreign corporations for the privilege of conducting intrastate business. As was said by Mr. Justice Shiras, in New York v. Roberts, 171 U. S. 658, at 661, 662: "It must be regarded as finally settled by frequent decisions of this court that, subject to certain limitations as respects interstate and foreign commerce, a State may impose such conditions upon permitting a foreign corporation to do business within

its limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax." Coulter v. Louisville & Nashville Railroad, 196 U. S. 599. Pacific Express Co. v. Seibert, 142 U. S. 339. St. Mary's Petroleum Co. v. West Virginia, 203 U. S. 183, 191. Pullman Co. v. Kansas, 216 U. S. 56, 66, 67.

The single fact that a foreign corporation has become established within the State is not prohibitive against exercise of the power of the State as to the conditions under which the business may be continued where there is no permanent investment of property not adapted to general commercial uses like those of a railroad or telegraph company. This undoubted right of the State was treated as so clear as to need barely more than a statement in National Council United American Mechanics v. State Council of Virginia, 203 U. S. 151, 163. Hammond Packing Co. v. Arkansas, 212 U. S. 322. See Diamond Glue Co. v. United States Glue Co. 187 U. S. 611.

Petition dismissed with costs.

[Endorsed:] S. S. White Dental Mfg. Co. vs. Commonwealth. Certified Copy of the Opinion of the Supreme Judicial Court.

57 COMMONWEALTH OF MASSACHUSETTS,
Suffolk County:

Supreme Judicial Court.

In Equity. No. 17364.

S. S. WHITE DENTAL MANUFACTURING COMPANY, Petitioner,
vs.
COMMONWEALTH OF MASSACHUSETTS, Respondent.

Petition for a Writ of Error.

And now comes the S. S. White Dental Manufacturing Company, the above-named petitioner, and says that on the 5th day of July, 1912, the Supreme Judicial Court, within and for the County of Suffolk, in the Commonwealth of Massachusetts, entered final judgment herein, in favor of the above named respondent, and against the above named petitioner, in which judgment and the proceedings had prior thereto in this suit, certain errors were committed, to the prejudice of the above named petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore the S. S. White Dental Manufacturing Company, the said petitioner, prays that a writ of error may issue in this behalf out of the Supreme Court of the United States to the end that the errors so complained of may be corrected and the said judgment reversed, and that a transcript of the record, proceedings and papers

in this suit, duly authenticated, may be sent to the Supreme Court of the United States.

S. S. WHITE DENTAL MANUFACTURING COMPANY,
By E. H. BELL, *Managing Att'y.*

CHARLES A. SNOW,
WM. P. EVERTS,
Solicitors and Counsel for Original Petitioner and Plaintiff in Error.

58 Writ of error allowed, upon the execution of a bond by the above named petitioner as principal, and the American Bonding Company of Baltimore, as surety, in the sum of Two Hundred and Fifty (250) Dollars.

Sept. 12, 1912.

ARTHUR P. RUGG,
Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.

59 COMMONWEALTH OF MASSACHUSETTS,
Suffolk County:

Supreme Judicial Court.

In Equity. No. 17364.

S. S. WHITE DENTAL MANUFACTURING COMPANY (Original Petition-), Plaintiff in Error,
vs.
COMMONWEALTH OF MASSACHUSETTS (Original Respondent), Defendant in Error.

Assignment of Errors.

And now comes the S. S. White Dental Manufacturing Company, the above named petitioner and plaintiff in error, and with its petition for a writ of error makes and files the following assignment of errors, and says that there is manifest error in that the Supreme Judicial Court within and for the County of Suffolk, in the Commonwealth of Massachusetts, erred in refusing certain requests for rulings of law herein specified, duly made by the said petitioner, and otherwise erred in the respects herein set forth, namely,—

1. In upholding the constitutional validity of the excise imposed on foreign corporations (§56 of Part III of C. 490, Massachusetts Acts of 1909), and in holding that the said Statute is not in conflict with either the "commerce" or the "due process of law" clauses of the Federal Constitution, under the principles laid down in the Western Union and Pullman cases (216 U. S. 1, 56).

60 2. In failing to hold that the true test of constitutionality is the measure of the excise. If measured, as here, by the

entire capital, both interstate and domestic, the excise is unconstitutional, even though professedly imposed for the privilege of transacting purely domestic commerce.

3. In erroneously holding that the principles laid down in the Western Union and Pullman cases (216 U. S. 1, 56), with respect to the Kansas excise, are not equally conclusive as to the unconstitutionality of the Massachusetts excise imposed on foreign corporations engaged partly in interstate commerce and partly in intrastate commerce within the limits of Massachusetts, although the measure of the Massachusetts excise is precisely like that of the Kansas excise, being based upon its entire capital, representing its business everywhere, both interstate and domestic, and although the Massachusetts excise, like the Kansas excise, be exacted for the privilege of transacting a purely domestic business. The unlawful measure of the tax is what condemns it, and not the nature of the privilege granted.

4. In erroneously holding that the Western Union and Pullman decisions have no general application to mercantile or manufacturing corporations engaged partly in interstate and partly in domestic commerce, but are confined, in their application, to railroads, sleeping car and telegraph companies, and companies conducting the transportation of freight, passengers or intelligence "for hire" or other forms of quasi public business.

5. In erroneously holding that such decisions were based
61 on the fact that the interstate and intrastate portions of the plant and business of sleeping car and telegraph companies are so intertwined and inextricably interwoven that the domestic portion could not be abandoned without necessarily damaging the interstate portion of their plant and business. Whereas, on the contrary, these considerations played no part in these decisions, and were not in any way mentioned in the majority opinions, and obviously had no application to the Pullman Company, at least, which had no fixed plant in Kansas, and if it decided to abandon domestic business, had only to roll its cars out of the State or to decline to accept intrastate traffic.

6. In erroneously holding that the fact that the Massachusetts excise provides for a maximum tax is an important factor, whereas it is utterly immaterial, at least where the Company now before the Court is not affected by the maximum provision, but must, as here, pay the full percentage on its entire capital, both interstate and domestic.

7. In refusing to rule, pursuant to the 1st request, as follows:—

"Section 56 of Part III of Chapter 490 of the Acts of 1909, of the Commonwealth of Massachusetts is unconstitutional and void, under the Federal Constitution, so far as concerns this petitioner, because it imposes an unlawful tax and burden upon and regulation of interstate commerce in contravention of the "commerce" clause contained in Section 8 of Article 1 of the Federal Constitution."

8. In refusing to rule, pursuant to the 2nd request, as follows:

62 "The said Section 56 is unconstitutional and void, under the Federal Constitution, because it is in conflict with the "due process of law" clause contained in the Fourteenth Amendment to the Federal Constitution."

9. In refusing to rule, pursuant to the 3rd request, as follows:—

"Section 56 of Part III of Chapter 490 of the Acts of 1909 of Massachusetts, is unconstitutional and void, under the "commerce" clause of the Federal Constitution, with respect to all foreign corporations, including the petitioner, which are to any substantial extent engaged in interstate commerce, and which maintain an office and usual place of business in Massachusetts for the sale and delivery of their products or goods, at or through which office or place of business are conducted sales of goods involving interstate commerce as well as sales involving purely local or intrastate commerce, and which are maintained partly for the purpose of interstate commerce and partly for intrastate commerce, because the said Section 56 requires payment by such foreign corporations, including the petitioner, of an excise tax of a given per cent of the total authorized capital stock of such corporations, based, in effect, on all their property, capital, business and interests everywhere, including both their interstate and their intrastate business, commerce and property, and thereby imposes a burden on the interstate portion of the commerce and business of such corporation, thus constituting an unlawful regulation of interstate commerce in contravention of the "commerce" clause contained in Section 8 of Article 1 of the Federal Constitution.

63 10. In refusing to rule, pursuant to the 5th request, as follows:—

"The decisions of the Supreme Court of the United States in the Western Union and Pullman cases, 216 U. S. 1, 56, govern the decision of this case. In accordance with the principles there established, the Massachusetts excise tax is unconstitutional, as applied to any foreign corporation which maintains a Massachusetts place of business partly for the purposes of interstate commerce and partly for domestic or intrastate commerce, or maintains such place of business for the purpose of interstate sales of goods in connection with intrastate sales.

So long as it appears that some substantial portion of the sales or business conducted in Massachusetts is interstate commerce, the following considerations are immaterial factors, namely,—

a. Whether or not the principal part of the business conducted in Massachusetts is interstate commerce.

b. Whether or not the corporation is engaged in a transportation business or is 'conducting some kind of interstate commerce for hire as its principal function.'

c. Whether or not it is engaged in intrastate business 'so closely connected with the interstate commerce that it could not be gvien up without serious detriment to the interstate commerce.'"

11. In refusing to rule, pursuant to the 6th request, as follows:—

"That upon the allegations of the petition and the agreed facts, it

must be ruled as matter of law that sales or contracts for the
64 sale of goods manufactured or located in one State for delivery in other States constitute interstate commerce or transactions involving interstate commerce, irrespective of the fact that the transportation or delivery of such goods is performed by common carriers. The goods covered by such sales or contracts of sale are subjects of interstate commerce. The business of selling the same involves interstate commerce. The place of business or office where such sales are made or negotiated, or deliveries thereunder superintended, is one of the means or instrumentalities of interstate commerce. Such sales or contracts of sale, the goods sold thereunder, the business of selling and the office or place of business where sold are each and all under the protection of the "commerce clause" of the Federal Constitution, regardless of the question whether the seller is a transportation company or common carrier. Transportation and delivery are merely means or instrumentalities of interstate commerce. A company merely selling goods for delivery in other states is engaged in interstate commerce."

12. In refusing to rule, pursuant to the 7th request, as follows:—

"Section 56 of Part III of Chapter 490 of the Acts of 1909 of Massachusetts, as applied to foreign corporations, including the petitioner, which have real estate and other property situated wholly outside of Massachusetts, is unconstitutional and void, under the Federal Constitution, because subjecting their property situated outside of Massachusetts to taxation, and in undertaking to make the payment of a tax upon property beyond the borders of the State
65 a condition of retaining or securing the right to transact local or intrastate business within the limits of Massachusetts, and in thus depriving them of their property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution."

13. In refusing to rule, pursuant to the 8th request, as follows:—

"This excise tax is unconstitutional and void because it violates the "equal protection of the laws" clause of the Fourteenth Amendment, in that it creates an arbitrary and unreasonable classification between foreign corporations on the one hand and domestic corporations transacting the same kind of business on the other hand, taxing the former by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege."

14. In refusing to rule, pursuant to the 9th request, as follows:—

"Upon all the evidence the petitioner is entitled to recover the amount of the excise tax imposed upon it, with interest."

15. Because the Court erroneously sets up as the chief issue, the question whether this is an excise or a property tax, and, having determined it to be an excise, assumes the whole question of constitutionality to be decided. Whereas, no such issue appears in the record under the "commerce" clause, for the petitioner has always conceded and now expressly concedes that this is an excise, the sole question being whether, as an excise, it is a constitutional excise.

16. Because the Court erred in dismissing the petition, and in

not entering a decree for the petitioner pursuant to the terms
66 of the report, which required such decree, in case any of the rulings requested by the petitioner should have been given.

S. S. WHITE DENTAL MANUFACTURING COMPANY,
By CHARLES A. SNOW,
WM. P. EVERTS,
Its Solicitors and Counsel.

67 COMMONWEALTH OF MASSACHUSETTS.
Suffolk, ss:

Supreme Judicial Court

Equity. No. 17364.

S. S. WHITE DENTAL MANUFACTURING COMPANY, Petitioner (Plaintiff in Error),
vs.
COMMONWEALTH OF MASSACHUSETTS, Respondent (Defendant in Error).

(*Bond on Writ of Error.*)

Know all men by these presents that we, the S. S. White Dental Manufacturing Company, the above named petitioner and plaintiff in error, as principal, and the American Bonding Company of Baltimore, a corporation duly established under the laws of the State of Maryland and having an usual place of business in Boston in the County of Suffolk and Commonwealth of Massachusetts as surety, are held and firmly bound unto the Commonwealth of Massachusetts, the above named respondent and defendant in error in the full and just sum of Two hundred and fifty (250) Dollars to be paid to the said Commonwealth of Massachusetts: to which payment well and truly to be made we bind ourselves, our Heirs, Executors, and Administrators, and successors and assigns, jointly and severally, by these Presents.

Sealed with our seals, and dated the eleventh day of September in the year of our Lord one thousand nine hundred and twelve.

Whereas lately in the Supreme Judicial Court of the Commonwealth of Massachusetts sitting within and for the County of Suffolk in the above suit depending in said Court between the said S. S. White Dental Manufacturing Company, Petitioner and
68 the Commonwealth of Massachusetts, Respondent, final judgment was rendered against the said S. S. White Dental Manufacturing Company, Petitioner, and in favor of the said Commonwealth of Massachusetts, Respondent, and the said S. S. White Dental Manufacturing Company, having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to

the said Commonwealth of Massachusetts citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington thirty days after the date of such citation.

Now the condition of the above obligation is such, that if the said S. S. White Dental Manufacturing Company shall prosecute its said writ of error to effect, and answer all damages and costs, if *he* fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

THE S. S. WHITE DENTAL MFG. CO. [L. S.]
E. H. BELL, *Managing Attorney.* [L. S.]
AMERICAN BONDING COMPANY OF BALTIMORE,
By WALLACE EGERTON, *Vice-Pres't.*

Attest:
[SEAL.] F. M. GERLACH, *Ass't Sec'y.*

Signed, sealed and delivered in presence of
—— ——.

Sept. 12, 1912, Approved:
ARTHUR P. RUGG,
Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.

69 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington in the District of Columbia thirty days after the date of this citation, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Judicial Court of the Commonwealth of Massachusetts within and for the County of Suffolk, wherein the S. S. White Dental Manufacturing Company (the original Petitioner), a corporation duly established and existing under the laws of the State of Pennsylvania and having an usual place of business in Boston in said County of Suffolk, is the plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts this 12th day of September, in the year of our Lord one thousand nine hundred and twelve.

ARTHUR P. RUGG,
Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.

70 [Endorsed:] 17364 Eq. S. S. White Dental Mfg. Co. vs. Commonwealth of Mass. Citation. Suffolk, ss. Supreme Judicial Court. Filed Sep. 12, 1912. John F. Cronin, clerk.

SEPT. 16, 1912.

Service of the within citation is acknowledged for the Commonwealth of Massachusetts.

JAMES M. SWIFT,
Attorney General.

71 COMMONWEALTH OF MASSACHUSETT,
Suffolk, ss:

Supreme Judicial Court.

In Equity. No. 17364.

S. S. WHITE DENTAL MANUFACTURING COMPANY (Original Petitioner), Plaintiff in Error,
vs.
COMMONWEALTH OF MASSACHUSETTS (Original Respondent), Defendant in Error.

Præcipe.

To the Clerk of the Supreme Judicial Court within and for the County of Suffolk:

Please incorporate into the transcript of the record, to accompany your return to the writ of error, the report to the Supreme Judicial Court, the agreed statement of facts, the petitioner's requests for rulings, rescript and final decree, besides copies of petition for writ of error, assignments of error, bond and citation, and proceedings thereon, and copy of opinion of full bench, the Counsel for the plaintiff in error deeming the above portions of the record to be material to and necessary for a decision of the questions involved.

You may also annex a copy of the pleadings, though not deemed to be important.

Yours respectfully,

CHARLES A. SNOW,
WILLIAM P. EVERTS,
(Per C. A. S.,)
Counsel for Plaintiff in Error.

September 17, 1912.

72 *Affidavit of Service.*

I, Charles A. Snow, one of the Counsel for the plaintiff in error, declare and state that I have served a copy of the foregoing præcipe on the respondent, by sending a copy thereof by registered mail, addressed to "Hon. James M. Swift, Attorney General of the Common-

wealth of Massachusetts," the Counsel for the defendant in error, at his usual place of business, at the State House, Boston, Massachusetts, postage prepaid, on September 18, 1912.

CHARLES A. SNOW.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, *September* 18, 1912.

Then personally appeared the above named Charles A. Snow and made oath that the foregoing statements by him subscribed are true.

[Seal of Albert S. Hutchinson, Notary Public for the Commonwealth of Massachusetts, U. S. A.]

Before me,

ALBERT S. HUTCHINSON,
Notary Public.

[Endorsed:] No. 17,364. S. S. White Dental Mfg. Co., P'ff in Error, v. Commonwealth of Massachusetts, D'f't in Error. Affidavit of service of præcipe. Suffolk, ss. Supreme Judicial Court. Filed Sep. 18, 1912. John F. Cronin, Clerk.

73 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Supreme Judicial Court.

I, John F. Cronin, Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts, do hereby certify that the papers hereunto annexed are an exemplification of the record in the case of S. S. White Dental Manufacturing Company, Petitioner, vs. Commonwealth of Massachusetts, Respondent, in said Supreme Judicial Court determined; and attached thereto, and transmitted with said record, are a copy of the Opinion of the Supreme Judicial Court for the Commonwealth, attested by the Reporter of Decisions; a copy of the Application for Writ of Error; a copy of the Assignment of Errors; and the original Citation with acceptance of service endorsed thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Boston this thirtieth day of September in the year of our Lord one thousand nine hundred and twelve.

[SEAL.] JOHN F. CRONIN, *Clerk.*

Endorsed on cover: File No. 23,375. Massachusetts Supreme Judicial Court. Term No. 800. S. S. White Dental Manufacturing Company, plaintiff in error, vs. Commonwealth of Massachusetts. Filed October 5th, 1912. File No. 23,375.

21

Office Supreme Court, U. S.
FILED.
MAR 10 1913
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

No. 353 OCTOBER TERM, 1912.

S. S. WHITE DENTAL MANUFACTURING CO.,
Plaintiff in Error,

v.

COMMONWEALTH OF MASSACHUSETTS.

MOTION.

CHARLES A. SNOW,
Attorney for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 800.

S. S. WHITE DENTAL MANUFACTURING CO.,
Plaintiff in Error,

v.

COMMONWEALTH OF MASSACHUSETTS.

MOTION.

Now comes the Plaintiff in Error, and moves that the above-entitled case, and BALTIC MINING COMPANY, Plaintiff in Error, *v.* COMMONWEALTH OF MASSACHUSETTS, No. 268, be heard together and argued as one case, when the Baltic Mining Company case shall be reached in its order.

REASONS FOR MOTION.

Both cases involve the same constitutional question as to the validity of the Massachusetts foreign corporation tax. (Sts. 1909, c. 490, Part 3, Sec. 56.)

The same counsel appear.

The above case is the latest decision of the Massachusetts Court upon this statute, and, we submit, should be

considered at the same time as the earlier decision in the Baltic case.

S. S. WHITE DENTAL MANUFACTURING CO.,
Plaintiff in Error.

By CHARLES A. SNOW,
its Attorney.

The COMMONWEALTH OF MASSACHUSETTS, Defendant in Error, in both cases referred to, consents to the granting of the above motion.

JAMES M. SWIFT,
Attorney-General of Massachusetts,
for Defendants in Error.

APR 7 1913
JAMES H. McKENNEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 80

BALTIC MINING COMPANY,
Plaintiff in Error

v.

COMMONWEALTH OF MASSACHUSETTS.

No. 353

S. S. WHITE DENTAL MANUFACTURING COMPANY,
Plaintiff in Error

v.

COMMONWEALTH OF MASSACHUSETTS.

In Error to the Supreme Judicial Court of Massachusetts.

BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES A. SNOW,
WILLIAM P. EVERTS,
Counsel for Plaintiffs in Error.

Supreme Court of the United States

OCTOBER TERM, 1912

No. 268.

BALTIC MINING COMPANY, *Plaintiff in Error*

v.

COMMONWEALTH OF MASSACHUSETTS.

No. 800.

S. S. WHITE DENTAL MANUFACTURING COMPANY, *Plaintiff in Error*

v.

COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES A. SNOW,
WILLIAM P. EVERTS,
Counsel for Plaintiffs in Error.

BOSTON
PRESS OF GEO. H. ELLIS CO.
1913

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(3) Massachusetts excise, in S. S. White case, at least, also conflicts with "equal protection of the laws" clause, under principles of *Southern Railway Co.* v. *Greene* (216 U. S. 400) 12

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I.

The Massachusetts statute is void because repugnant to the "commerce" and "due process" clauses of the Federal Constitution 17–33

A.

A State cannot lawfully impose an excise measured by the entire capital stock of a foreign corporation engaged in interstate commerce as a condition of its right to transact domestic business.

Such a measure, in its necessary effect and operation, directly and substantially burdens interstate commerce. It is, therefore, a regulation of interstate commerce and void, because repugnant to the "commerce" clause.

The constitutionality of the Massachusetts excise, under the "commerce" clause, is conclusively settled by the principles established in the Western Union and Pullman cases (216 U. S. 1, 56).

These cases also conclusively determine that the Massachusetts statute is unconstitutional, because it violates the "due process" clause by taxing property outside of the State, for that is the necessary effect and operation of an excise measured by a company's entire capital, representing its property, both within and without the State 17–23

A State statute which imposes an excise *measured* by the entire capital stock of a foreign corporation engaged, to a substantial extent, in interstate commerce, is unconstitutional and void, because repugnant to the "commerce" clause, even though professedly exacted for the privilege of transacting domestic commerce 17–18

This is conclusively settled by Western Union and Pullman decisions (216 U. S. 1, 56).

An excise measured by the entire capital stock of a foreign corporation having property outside of the taxing State, is unconstitutional, because it conflicts with the "due process" clause 18

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This is also conclusively settled by the Western Union and Pullman decisions 18

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That these decisions rest upon both grounds is fully shown in:—

Ludwig v. *Western Union Telegraph Co.*, 216 U. S. 146.

Western Union Tel. Co. v. *Andrews*, 216 U. S. 165.

Southern Railway Co. v. *Greene*, 216 U. S. 400.

Flint v. *Stone Tracy Co.*, 220 U. S. 107, 163.

Atchison, etc., R.R. Co. v. *O'Connor*, 223 U. S. 280, 285 18–19

Massachusetts excise differs in no material respect from Kansas excise 19

Court below held that Western Union and Pullman decisions were decided upon grounds wholly different from those stated upon the face of the decisions . 19

Distinctions and refinements attempted by Court below, 19

Court below claims that these decisions are limited to *quasi*-public corporations and do not extend to mercantile, manufacturing, and mining companies engaged partly in interstate and partly in domestic commerce, and that these decisions are confined to *quasi*-public corporations which transact an interstate business so intertwined with its domestic commerce that the latter could not be abandoned without serious detriment to the former 19

Unless these distinctions and refinements can be sustained, the Massachusetts excise must fall, because it conflicts with the "commerce" clause 19

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Real grounds of Pullman decision, as stated in opinion of Court by Mr. Justice Harlan 19–20

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No suggestion in opinions themselves, as quoted, limiting their scope to palace car, telegraph, or other *quasi*-public corporations 20

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Grounds of these decisions, as stated by Mr. Justice Day in *Southern Ry. Co.* v. *Greene* (216 U. S. 400, 416) 21

Grounds of Western Union and Pullman decisions, as stated by Mr. Justice Harlan in *Ludwig* v. *Western Union Tel. Co.* (216 U. S. 146, 163) 21–22

Grounds of these decisions, as stated by Mr. Justice Day in *Flint* v. *Stone Tracy Co.* (220 U. S. 107, 163) 22

Grounds of same, as stated by Mr. Justice Holmes in *Atchison, etc., Ry. Co.* v. *O'Connor* (223 U. S. 280, 285) 22

B.

The Western Union and Pullman cases and decisions following them conclusively settle the proposition that the necessary effect of an excise based on the entire capital of an interstate commerce corporation is to burden directly and substantially the interstate portion of its business, even though professedly imposed for the privilege of transacting domestic business.

If it was the necessary result as to the Pullman and Western Union Companies, the same excise inevitably has the same effect upon all interstate commerce corporations.

The mere fact that a company is not a quasi-public corporation cannot alter the necessary effect and operation of such an excise.

These decisions also conclusively settle the proposition that the necessary effect of such an excise upon an interstate commerce corporation is to tax its property located beyond the borders of the taxing State.

As the necessary effect and operation of the Massachusetts statute must be precisely like those resulting from the Kansas statute, in the same terms, the Massachusetts statute is unconstitutional upon both grounds . . 23–24

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Pullman Company *v.* Kansas, 216 U. S. 56, fully stated,
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Rests on two distinct grounds: (1) that the Kansas excise was repugnant to the "commerce" clause, and (2) that it violated the "due process" clause . 26
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Massachusetts excise more burdensome than Kansas excise 27
Both Kansas and Massachusetts taxes admittedly excises, and not property taxes 27
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Pullman Co. possessed no permanent plant or investments in Kansas 27
Neither in these decisions nor in the later cases has this Court ever alluded to any of the factors deemed vital by the Court below 27
Decisions in *Ludwig* v. *Western Union Tel. Co.* (216 U. S. 146) and *Western Union Tel. Co.* v. *Andrews* (216 U. S. 165) stated, holding Arkansas foreign corporation excise, based on entire capital stock, to be unconstitutional upon same grounds as Western Union and Pullman cases 28
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C.

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It is claimed that they are limited (1) to quasi-public corporations and (2) to cases where the interstate commerce is so intertwined with the domestic business that the latter cannot voluntarily be abandoned without serious detriment to the former.

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Pullman Co. had no permanent investments in Kansas. If it chose to abandon local business, it had only to roll its cars out of the State 30

Even the Massachusetts Court admits that trading companies are protected by "commerce" clause, provided they are exclusively engaged in interstate commerce 30

But holds they are not protected when they transact domestic business in connection with interstate commerce 30

Misconception by Court below as to meaning of "ordinary business" as used in opinion of Mr. Justice Harlan. It was meant thereby to refer to *ordinary domestic commerce*, as contrasted with interstate commerce. No intention of contrasting ordinary trading companies with *quasi*-public corporations . 31, 32

Summary of reasons why Court below has wholly misconceived the grounds and scope of Western Union and Pullman decisions 32, 33

II.

Prior to Western Union and Pullman decisions it was established law that any occupation or privilege tax, license fee, or other excise, which directly and substantially burdens interstate commerce, is unconstitutional.

The necessary operation and effect of the excise is the essential inquiry, though the tax is professedly exacted for a local privilege.

Where a tax necessarily affects and burdens interstate commerce, its effect cannot be altered by the mere fact that the corporation is not a quasi-public corporation 33

Where no question of interstate commerce is involved, a State may, at its pleasure, totally exclude foreign corporations from its limits or admit them to the privilege of transacting domestic business upon such terms and conditions as it deems best . . . 33, 34

The cases relied upon by the Court below are:—

Osborne v. *Florida*, 164 U. S. 160.
Pullman Company v. *Adams*, 189 U. S. 420.

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Allen v. *Pullman Company*, 191 U. S. 171.
Horn Silver Mining Co. v. *New York*, 143 U. S. 305.
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They have no application to a case where the necessary effect of a particular excise is to burden interstate commerce directly and substantially 34
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If an excise, by its necessary effect, directly and substantially burdens interstate commerce, it is unconstitutional, though professedly exacted for a local privilege 35
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Where *bona fide* attempt to apportion between interstate and domestic receipts, or where tax for a local privilege is measured by the proportionate

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Of this character is Massachusetts legislation regarding railroad and telegraph companies 37

III.

The theory of the Massachusetts Court that the principles of the Pullman and Western Union cases have no application where the company is free to renounce or abandon its domestic business, and only apply where the interstate and domestic business are inextricably interwoven, has no support in reason or upon the authorities.
This theory is not supported by any of the cases cited by the Court below, because in none of them was interstate commerce involved.
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Decision below derived from *dictum* in Adams case that "the company cannot complain of being taxed for the privilege of doing a local business which it is *free to renounce*" 38
But in Pullman decision Pullman Co. was equally "free to renounce" local business, but tax there held unconstitutional 38
If this is material factor, the decisions are irreconcilable and Adams case was overruled by Western Union and Pullman decisions 38
But Court found no occasion to overrule Adams case, because it did not involve interstate commerce . . 38
Necessary effect and operation of a tax in directly burdening interstate commerce cannot be altered merely because a trading corporation is involved instead of a telegraph or sleeping car company . 39

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Or because the company may abandon local business without serious loss 39

Pullman Co. had no permanent plant in Kansas. Its interstate business was not interwoven with domestic business, so that latter could not be abandoned without serious injury to former 39

Local traffic of Pullman Company easily separable from interstate commerce 40

If local business were voluntarily renounced, present companies would suffer as much damage as Pullman Co., which had only to roll its cars out of State at its pleasure 40

Pullman case involved facts different from Western Union case with respect to permanent investments and freedom to renounce local business. Yet in each case excise was held unconstitutional . 40

Real meaning of *dictum* in Adams case 40, 41

Separability of domestic and interstate receipts often considered an important reason for holding excises unconstitutional, where interstate and domestic receipts are taxed indiscriminately and without attempt at apportionment 41

The measure of the excise and its necessary effect and operation in burdening interstate commerce are the material factors. An excise measured by the entire capital is based upon an erroneous *measure*, because it necessarily burdens in a direct and substantial manner the interstate portion of company's business 41

Decision in *Allen* v. *Pullman Co.* (191 U. S. 171) stated 42

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Osborne v. *Florida* (164 U. S. 650) stated 43

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Case involved excise for privilege of maintaining office in the State, when the foreign corporation is engaged in interstate commerce, but has no railroad within the State 47

Baltic office maintained for the "general financial management and direction of the company's affairs," and, accordingly, was maintained for furtherance and management of *all* its business, including its *interstate sales* made through its selling agent 48

IV.

Sales of goods or contracts for their sale made in one State, for delivery in another State, or requiring transportation through more than one State, constitute transactions of interstate commerce, notwithstanding the fact that the transportation is conducted, not by the seller, but by common carriers.

The S. S. White Company was clearly engaged in interstate commerce. At and through its Boston place of business, sales and contracts of sale requiring transportation and delivery from one State into other States and deliveries thereunder were either negotiated, managed, or superintended.

The Baltic Company was also clearly engaged in interstate commerce, all sales made by the United Metals Selling Company, "as its agent," being made by the principal itself.

The "larger part" of the sales of its copper were consummated in New York, such sales being there made for delivery in and throughout the several States of the United States, including Massachusetts, and in foreign countries.

Tax upon seller of goods is tax upon goods themselves . 48

A "tax upon goods sold in another State, delivered to a common carrier and consigned to the purchaser in the State of Georgia, was an illegal

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interference with interstate commerce," as stated in *Kehrer* v. *Stewart* (197 U. S. 60, 65) 49

Sales or contracts of sale made or negotiated in one State for delivery in another, or requiring transportation to the purchaser in another State, are transactions of interstate commerce 49

Argument in behalf of Commonwealth that sales here do not involve interstate commerce, because (1) transportation and delivery of goods sold is conducted by common carriers and (2) because title passes to goods upon delivery to common carriers in Massachusetts, though transported to purchasers in other States 49

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S. S. White Company engaged in at least six different kinds of interstate commerce 50

Also clear that Baltic Company was engaged in interstate commerce to a substantial extent 50

In Court below decision based upon express assumption that S. S. White Company was conducting interstate commerce to a very large extent . . . 50

Exact fact and proportions of interstate commerce of no consequence 50

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It seems to be contended in behalf of Commonwealth that ordinary trading and manufacturing companies selling goods in one State for delivery in other States are not engaged in interstate commerce, but that only common carriers conducting transportation are so engaged 51

Sale and barter of goods for delivery in other States the original conception of interstate commerce . 51

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Railroads the ordinary instrumentalities of transacting interstate commerce 53
Attempt here made to convert a mere incident, railroad transportation, into the very essence of the idea of interstate commerce 53

V.

The protection of the "commerce" clause is not limited to quasi-public corporations.
The negotiation of sales by ordinary trading corporations engaged in interstate commerce comes within the protection of the "commerce" clause, as against state statutes imposing excises, whether in the form of occupation or privilege taxes, or of license fees . 54

No cases can be cited in support of view that ordinary trading or manufacturing companies do not come within protection of "commerce" clause . . . .
Many decisions prior to Western Union and Pullman cases decided that interstate sales of goods, the companies and agents making them, their business and the place where the business is conducted, are all protected by the "commerce" clause against State excises, and that the protection of that clause is not limited to railroads and *quasi*-public corporations 54
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Cases above cited settle proposition that sales of goods for delivery in other States constitute transactions of interstate commerce, and that the protection of the "commerce" clause is extended to trading, manufacturing, and mining companies engaged in interstate sales, and is not confined to *quasi*-public corporations 58, 59

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The Baltic office was used for "general financial management and direction of the company's affairs." It must, therefore, have been maintained, in part, at least, for the management, supervision, and direction of its interstate sales, constituting at least ninety-five per cent. of its total sales . . . 60

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These cases show clearly that protection of "commerce" clause is extended to ordinary trading corporations engaged in interstate sales, and is not confined to *quasi*-public corporations 61

Ordinary trading corporations engaged in interstate commerce may enter a State or continue to transact business therein, without complying with foreign corporation statutes requiring annual returns and the like 62

Even Massachusetts Court holds that ordinary trading corporations are protected by the "commerce" clause, when exclusively engaged in interstate commerce 63

VI.

The Massachusetts excise is unconstitutional and void, because it is also repugnant to the "equal protection of the laws" clause.

A State cannot subject a foreign corporation, which is already in the State in compliance with its laws and has there acquired property of a fixed and permanent nature, to a new or additional excise, for the privilege of doing local business, which is not at the same time imposed upon domestic corporations 63

Massachusetts excise unconstitutional because it also conflicts with "equal protection of the laws" clause, under principles of *Southern Railway Co.* v. *Greene* (216 U. S. 400) 63

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VII.

The fact that this excise has a maximum limit cannot help its constitutionality, especially where the maximum is not applicable to the company before the Court.

The companies before the Court are taxed at the rate of one-fiftieth of one per cent. on their entire capital. The maximum limit has no application to the companies now before the Court.

The amount or reasonableness of the excise are immaterial, but the inequality of an arbitrary maximum is shown by fact that plaintiffs in error pay at a rate ten times as high as a one-hundred-million dollar company would pay.

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Supreme Court of the United States

OCTOBER TERM, 1912

No. 268.

BALTIC MINING COMPANY, *Plaintiff in Error*

v.

COMMONWEALTH OF MASSACHUSETTS.

No. 800.

S. S. WHITE DENTAL MANUFACTURING COMPANY, *Plaintiff in Error*

v.

COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

These cases involve the constitutionality of the Massachusetts excise on foreign corporations, based on their entire capital, under the principles settled by the *Western Union* and *Pullman* decisions (216 U. S. 1, 56), where the Kansas excise of precisely the same character was held unconstitutional.

The Massachusetts statute is claimed to be unconstitu-

tional and void upon the same grounds upon which the Kansas statute was condemned; viz., because it conflicts (1) with the "commerce clause" and (2) with the "due process" clause of the Federal Constitution.

It is also claimed to be unconstitutional under the "equal protection of the laws" clause, following the principles established by *Southern Railway Co.* v. *Greene* (216 U. S. 400).

The Massachusetts statute is in these terms:—

"Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars" (Mass. Acts 1909, C. 490, Part III, Sec. 56).

The Kansas statute, in almost precisely the same terms, provided that each foreign corporation should pay a charter fee of "one-tenth of one per cent of its authorized capital, upon the first one hundred thousand dollars of its capital stock, or any part thereof," and for each million above five hundred thousand dollars the excise amounted to one-fiftieth of one per cent., the exact amount specified as the *annual* tax in the Massachusetts statute (216 U. S. 56, 59).

The Massachusetts statute, upon its face, applies to "every such foreign corporation which has a usual place of business in this commonwealth" (St. 1903, C. 437, Sec. 58; St. 1909, c. 490, Part III, Sec. 39).

By judicial construction the meaning has been narrowed, so that it no longer applies to foreign corporations exclusively engaged in interstate commerce, nor to *quasi*-public corporations carrying on business "for hire" and engaged partly in interstate and partly in domestic business, where it appears that the intrastate business is "so closely con-

nected with the interstate commerce that it could not be given up without serious detriment to the interstate commerce" (S. S. White Case, 212 Mass., p. 35).

The statute, accordingly, still applies to all other classes of interstate commerce corporations which are also engaged in transacting domestic business in Massachusetts. It applies to all mercantile, trading, manufacturing, and mining companies there transacting interstate commerce, consisting of sales of goods in one State for delivery in another State, and also carrying on, in connection therewith, a purely domestic business.

By construction the excise is imposed, as was the Kansas tax in express terms, as a condition of granting the right to transact local or domestic business. As thus applied to both plaintiffs in error, the statute was held constitutional by the Massachusetts Court (*S. S. White Dental Mfg. Co.* v. *Commonwealth*, 212 Mass. p. 35; *Baltic Mining Co.* v. *Commonwealth*, 207 Mass. 381).

The excise is measured by a percentage upon its entire capital, representing its business and property everywhere, both interstate and domestic.

The tax is not confined to stock actually issued, but covers the entire authorized capital.

It is an annual tax, thus differing from the Kansas statute. In point of amount the Massachusetts statute imposes a much heavier tax, for it assesses an *annual* payment of one-fiftieth of one per cent., whereas Kansas assessed exactly the same percentage, payable once for all, as a charter fee for the privilege, in the case of corporations having $1,000,000 capital or more. A maximum tax of $2,000 is provided for in the Massachusetts statute.

A foreign corporation is not allowed to file its required annual certificate of condition "until the excise tax required by the following section [Sec. 56 above quoted] has been paid to the treasurer and receiver general" (St. 1909, c. 490, Part III, Sec. 55).

It must annually, within thirty days after the date of the annual meeting, file in the office of the Secretary of the Commonwealth its certificate of condition, showing its assets and liabilities and the amount of its authorized capital (St. 1909, C. 490, Part III, Sec. 54).

If it fails to file its annual certificate of condition, the Tax Commissioner gives it notice of its default, and, if the corporation fails to file its certificate within thirty days thereafter, "it shall forfeit to the commonwealth not less than five nor more than ten dollars for each day for fifteen days after the expiration of the said thirty days, and not less than ten nor more than two hundred dollars for each day thereafter during which such default continues, or any other sum, not greater than the maximum penalty or forfeiture, which the court may deem just and equitable, which, in the case of a foreign corporation, shall be recovered as herein provided" (St. 1909, C. 490, Part III, Sec. 58).

Such penalties and forfeitures may be recovered by action or by an information in equity in the name of the Attorney-General, at the relation of the Tax Commissioner.

"Upon such information, the court may issue an injunction restraining the further prosecution of the business of the corporation named therein until such penalties or forfeitures, with interest and costs, have been paid, and until the returns and certificates required by this act have been filed" (*ibid.*).

Payment of the Massachusetts excise is not exacted as a condition of granting the corporation the right to *enter* the State for the transaction of domestic business.

The Massachusetts excise is annually exacted as a condition of the right to *continue* the transaction of purely domestic business in connection with its interstate commerce, under the statute as construed by the Massachusetts Court.

The requirements imposed for the admission of a foreign corporation to Massachusetts for the transaction of any kind of business therein appear in other statutes (St. 1903, C. 437, Secs. 58, 60).

Such a corporation must, before commencing business therein, appoint the Commissioner of Corporations as its attorney for purposes of service of process (*ibid.*, Sec. 58).

Every foreign corporation must also, before transacting business therein, file with the Commissioner of Corporations a copy of its charter or certificate of incorporation, a true copy of its by-laws, and a certificate setting forth its name, the location of its principal office, the names and addresses of its officers and directors, the date of its annual meeting, the amount of its capital stock, authorized and issued, the number and par value of its shares, the amount paid in thereon, and the manner of payment (*ibid.*, Sec. 60).

The S. S. White Company was duly admitted to do business in Massachusetts about ten years previously, and has since duly complied with the requirements of the corporation laws and has duly paid its taxes (S. S. White, Rec. 13). Since its admission it has maintained its place of business in Boston on leased premises which are obviously fitted up with permanent trade and tenant's fixtures and appliances adapted to its entire business, both interstate and domestic (S. S. White, Rec. 11).

When it entered Massachusetts, the foreign corporation excise was less onerous, being one-half of the present amount, or one-hundredth of one per cent., as assessed under the Statute of 1903, which provided that every foreign corporation should annually pay "an excise tax to be assessed by the tax commissioner of one hundredth of one per cent. of the par value of its authorized capital stock as stated in its annual certificate of condition; but it may deduct from such tax the amount of taxes upon property paid by it to any city or town in the commonwealth during the preceding year, and the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars" (St. 1903, C. 437, Sec. 75). The percentage was doubled by St. 1907, C. 578, and the clause allowing the deduction of local property taxes was repealed. The present law (St. 1909, C.

490, Part III, Sec. 56), as quoted above, is in the precise terms of St. 1907, C. 578.

Domestic and foreign corporations are both taxable locally, domestic corporations upon their Massachusetts real estate and machinery (St. 1909, C. 490, Part I, Secs. 2, 3 and Sec. 23, Clauses 1, 2), and foreign corporations upon their real estate, machinery, and merchandise (*ibid.*).

From 1903 to 1907 both domestic and foreign corporations might deduct local property taxes (St. 1903, C. 437, Secs. 72, 75). As above shown, this privilege was taken away from foreign corporations in 1907 (St. 1907, C. 578), but is still retained for domestic corporations in the same line of business and having the same kind of property, which are entitled to deduct from the market value of their shares, the basis of their excise tax, the value of real estate, machinery, and non-taxable securities, and also "the value of its property situated in another state or country and subject to taxation therein" (St. 1909, C. 490, Part III, Sec. 41, Clause 3; see also Sec. 43).

No extended reference to the facts and rulings in the Baltic case is required, for the rulings there requested are substantially the same as in the S. S. White case. The decision in the S. S. White case represents the latest views of the Massachusetts Court, and upon a state of facts where no possible suggestion can be made to the effect that the corporation was not engaged in the transaction of interstate commerce to a substantial extent.

Both cases were heard by the trial Court upon agreed facts, and requests for rulings presented by the plaintiff in error. The cases were then reported to the full bench of the Supreme Judicial Court. According to the terms of the report the Court "refused all of said requests, and ordered the petition dismissed. . . . If my rulings were correct, a decree to be entered dismissing the petition; otherwise, a decree to be entered for the petitioner" (S. S. White, Rec. 16; Baltic, Rec. 11).

These suits are for the recovery of an unlawful tax, assessed under a statute alleged to be unconstitutional. The form of remedy is specifically authorized by St. 1909, C. 490, Part III, Sec. 70.

No question is raised in the decisions below as to the propriety of the remedy.

The rulings requested and refused are substantially alike in each case, as are also the assignments of error.

The S. S. White Company is a trading and manufacturing corporation organized under the laws of Pennsylvania, where it has its principal factory and offices. Its business is the sale and manufacture of dental goods, instruments, and supplies. Some of the goods sold are manufactured by itself, and some are purchased from others. It does no manufacturing in Massachusetts. It maintains in Boston a place of business, consisting of "large salesrooms, stock rooms, offices and store rooms, which it occupies under lease" (S. S. White, Rec. 11), in which are counters and shelves and similar trade or tenant's fixtures (*ibid.*).

Here "a New England manager or sales agent is in control, and fifty-four persons are employed, twelve of whom are traveling salesmen who travel through Massachusetts and all the New England States, except Connecticut, and through the Maritime Provinces, and send orders received by them to the Boston office for acceptance" (*ibid.*). It sells goods both at wholesale and at retail over its counters. Approximately ten per cent. of the company's total sales made throughout the country are made in Massachusetts, "approximately one-half of the sales made in Massachusetts being for delivery to purchasers residing in Massachusetts, and approximately one-half thereof being for delivery to purchasers residing outside of Massachusetts" (S. S. White, Rec. 12).

This statement applies to the total sales made in Massachusetts, whether deliverable from the Boston stock or from the Pennsylvania and New York factories.

Out of the sales made from the Boston stock, about fifty per cent. are "sold to persons residing within Massachusetts" and "about an equal quantity of goods for delivery to purchasers residing or having their place of business outside of Massachusetts in all the New England States, except Connecticut, and in the Maritime Provinces" (S. S. White, Rec. 11).

Besides deliveries made from its Boston stock, "at the Boston place of business, also, orders are accepted and contracts made by the petitioner for the sale of goods to be delivered, not from the Boston stock but from the company's Pennsylvania or New York factories. In such cases the Boston office, after accepting an order received from one of its twelve salesmen travelling through New England or the Maritime Provinces, sends the order or requisition to the company's principal office in Pennsylvania, with the direction that the goods purchased be forwarded and delivered to the purchaser, pursuant to the contract of sale, at the purchaser's place of business, wherever it may be located. The goods are loaded at the Pennsylvania or New York factory of the petitioner, carried to the freight depot, billed to the purchaser as consignee and delivered to the railroad for transportation, and delivered direct to the purchaser at his place of business in whatever State he is located" (S. S. White, Rec. 11, 12).

Under the agreed facts it is a fair inference that orders negotiated by the twelve "drummers" are also filled from the Boston stock, whenever that is more convenient.

A "large percentage" of the company's total sales requires for delivery interstate shipments from the Pennsylvania and New York factories "into and through one or more other states before reaching the purchaser" (S. S. White, Rec. 12). A large percentage of its total income must therefore be derived from interstate commerce.

The company is thus engaged in transacting in Massachusetts a business partly interstate and partly domestic,

at least fifty per cent. being of an interstate character. It uses and maintains its Massachusetts place of business for its entire business, both interstate and domestic, without discrimination or separation.

The tangible property of the company in Massachusetts, consisting of stock on hand and fixtures (subject to local property taxes in Boston) and current bank deposits, averages about $100,000 (S. S. White, Rec. 11). Its total tangible property, all except $100,000 located outside of Massachusetts, amounts to over $5,000,000. (See Statement of Assets, S. S. White, Rec. 12.)

The company uses its Boston place of business partly for domestic business. This is almost necessarily confined to sales made in Massachusetts for delivery to local purchasers out of the Boston stock. These transactions amount only to fifty per cent. of the deliveries out of the Boston stock (S. S. White, Rec. 11).

It also uses its Boston place of business for the purposes of interstate commerce.

At least six distinct kinds of sales, deliveries, and transactions, involving interstate commerce, are conducted at or through the Boston office:—

1. Sales made from the Boston stock for delivery to purchasers outside of Massachusetts, aggregating fifty per cent. of the total deliveries from the Boston stock, such sales being made in Massachusetts (S. S. White, Rec. 11).

2. Sales made in Massachusetts of goods manufactured at the Pennsylvania or New York factories, and delivered from there to Massachusetts purchasers.

3. Sales made in Massachusetts of goods located at the Pennsylvania and New York factories and deliverable from there to purchasers residing outside of Massachusetts in the other New England States.

4. Sales or contracts for sale negotiated in the New England States outside of Massachusetts by the company's "drummers," the orders being forwarded to Boston for

acceptance, and the goods being deliverable from the Boston stock, thus requiring transportation from Massachusetts to other States.

5. Similar sales or contracts for sale thus negotiated by "drummers" and deliverable from the Pennsylvania or New York factories to the various New England States outside of Massachusetts.

6. At the Boston office twelve travelling salesmen are employed, who travel through the New England States "and send orders received by them to the Boston office for acceptance" (S. S. White, Rec. 11). These drummers travel from State to State for the purpose of negotiating sales and contracts of sale which require interstate deliveries. The Boston office is maintained, in part, for their headquarters in this class of interstate commerce. Besides its Massachusetts and Pennsylvania locations or offices, the company maintains fourteen other places of business situated in New York and other States (S. S. White, Rec. 12).

The Baltic case presents the same constitutional questions arising under requests for rulings and assignments of error in substantially the same form as the S. S. White case.

No detailed statement of the special facts in the Baltic case is required. It suffices to show that the Baltic Company was likewise engaged, to a substantial extent, in interstate commerce carried on in connection with its local or domestic business in Massachusetts.

If so, the rulings requested were appropriate and material to the case. It is a mining company, engaged in producing copper at its mine in Michigan. The copper is smelted and refined in Michigan, and "is then sold for delivery in and throughout the several States of the United States and foreign countries" (Baltic, Rec. 8). Not more than five per cent. of its sales of copper are "made or negotiated in Massachusetts for delivery here" (*ibid.*). Its

sales are made through a selling agent. "For the purpose of marketing and selling its copper, the petitioner employs, *as its agent*, the United Metals Selling Company, having granted to it an exclusive agency for the sale of its copper" (*ibid.*). Its selling agent has its main offices in New York "where the larger part of the sales of the petitioner's copper is consummated, such sales being there made for delivery in and throughout the several States of the United States and in foreign countries" (*ibid.*).

Its copper is "sold in considerable quantities for delivery to purchasers and consumers residing in Massachusetts, as well as for delivery in other States, the larger part of the sales of its copper being consummated in New York City. The delivery of the copper to the purchaser is effected by transporting the same from the Michigan smelter to the purchaser at his place of business in Massachusetts, or elsewhere, as the case may be" (*ibid.*). In some exceptional instances, sales are consummated in Massachusetts, but such sales "do not exceed five (5) per cent. of the total sales made by the Company for transportation and delivery of its copper outside of the State of Michigan, in and through the several States of the United States and in foreign countries" (*ibid.*).

The property of this company located in Massachusetts is of trifling amount, consisting only of cash, current bank deposits, and accounts, which do not exceed $16,185, and certain certificates of stock in a Michigan corporation, valued at $80,000. Its mine, plant, machinery, and equipment are located in Michigan and are "worth not less than $10,000,000" (Baltic, Rec. 7).

The company maintains an office in Boston for the use of its president, treasurer, and directors and "for the general financial management and direction of the company's affairs" (Baltic, Rec. 7, 8). The general financial management and direction of its affairs obviously cover the management and direction of its entire business and property,

including its interstate sales as well as its business purely domestic in character, such as domestic sales, directors' meetings, transfers of stock, if any, and the like.

The question is presented in both cases whether the Massachusetts statute is constitutional, under the "commerce clause," as applied to a corporation engaged partly in interstate commerce and partly in domestic business, and maintaining its Massachusetts place of business for both purposes without distinction, and whether the Massachusetts excise, being measured by its entire authorized capital, representing its business everywhere, both interstate and domestic, by its necessary effect and operation, imposes a direct and substantial burden upon the interstate portion of the company's business and thereby constitutes a regulation of commerce, in violation of the "commerce clause," exactly as the Kansas excise, in precisely the same form, was held directly to affect and burden interstate commerce in the *Western Union* and *Pullman* decisions (216 U. S. 1, 56).

The question is also presented in both cases whether such an excise by its necessary effect and operation taxes property of the company located beyond the borders of the taxing State, in violation of the "due process" clause, under the same decisions, which held the Kansas excise to be unconstitutional upon this additional ground.

The facts of the S. S. White case present the further question whether the Massachusetts statute also conflicts with the "equal protection of the laws" clause, under the principles laid down in *Southern Railway Co.* v. *Greene* (216 U. S. 400).

SPECIFICATION OF ERRORS.

The plaintiff in error in each case specifies the following errors relied upon:—

The Massachusetts Court erred in the following respects:—

1. In upholding the constitutional validity of the excise imposed on foreign corporations (Sec. 56 of Part III of C. 490, Massachusetts Acts of 1909) and in holding that the said statute is not in conflict with either the "commerce" or the "due process of law" clauses of the Federal Constitution, under the principles laid down in the Western Union and Pullman cases, 216 U. S. 1, 56 (1st Ass't Errors, S. S. White, Rec. 29; Baltic, Rec. 19).

2. "In failing to hold that the true test of constitutionality is the *measure* of the excise. If measured, as here, by the entire capital, both interstate and domestic, the excise is unconstitutional, even though professedly imposed for the privilege of transacting purely domestic commerce" (2d Ass't Errors, S. S. White, Rec. 29, 30).

3. In "holding that the Western Union and Pullman decisions have no general application to mercantile or manufacturing corporations engaged partly in interstate and partly in domestic commerce, but are confined, in their application, to railroads, sleeping car and telegraph companies, and companies conducting the transportation of freight, passengers or intelligence 'for hire' or other forms of *quasi*-public business" (4th Ass't Errors, S. S. White, Rec. 30).

4. In holding that the Western Union and Pullman decisions "were based on the fact that the interstate and intrastate portions of the plant and business of sleeping-car and telegraph companies are so intertwined and inextricably interwoven that the domestic portion could not be abandoned without necessarily damaging the interstate

portion of their plant and business. Whereas, on the contrary, these considerations played no part in these decisions, and were not in any way mentioned in the majority opinions, and obviously had no application to the Pullman Company, at least, which had no fixed plant in Kansas, and if it decided to abandon domestic business, had only to roll its cars out of the State or to decline to accept intrastate traffic" (5th Ass't Errors, S. S. White, Rec. 30).

5. In refusing to rule, pursuant to the 1st request for rulings (S. S. White, Rec. 13; Baltic, Rec. p. 10), as follows:—

"Section 56 of Part III, of Chapter 490, of the Acts of 1909 of the Commonwealth of Massachusetts, is unconstitutional and void, under the Federal Constitution, so far as concerns this petitioner, because it imposes an unlawful tax and burden upon and regulation of interstate commerce, in contravention of the 'commerce' clause contained in Section 8 of Article 1 of the Federal Constitution" (7th Ass't Errors, S. S. White, Rec. 30; 2d Ass't Errors, Baltic, Rec. 19).

6. In refusing to rule, pursuant to the requests for rulings (3d request, Baltic, Rec. 10; 4th request, substantially the same, S. S. White, Rec. 14), as follows:—

Section 56 of Part III of Chapter 490 of the Acts of 1909 of Massachusetts as applied to foreign corporations, including the petitioner, which are to any substantial extent engaged in interstate commerce, whether they are exclusively so engaged or not, is unconstitutional under the Federal Constitution, and therefore null and void, because said Section 56 requires payment by said foreign corporations, including the petitioner, of an excise tax of a given per cent. of the total authorized capital stock of such corporations, based, in effect, on all the property, capital, business, and interests of such corporations everywhere, including both their interstate and their intrastate business and property, and thereby imposes a burden on

the interstate business of such corporations, and subjects their property and business outside of the Commonwealth of Massachusetts to taxation, thus constituting an unlawful regulation of interstate commerce in contravention of the "commerce" clause embodied in Section 8 of Article 1 of the Constitution of the United States (9th Ass't Errors, S. S. White, Rec. 31; 4th Ass't Errors, Baltic, Rec. 19, 20).

7. In refusing to rule, pursuant to the 7th request (S. S. White, Rec. 15; 4th request, substantially the same, in Baltic, Rec. 11), as follows:—

Section 56 of Part III of Chapter 490 of the Acts of 1909 of Massachusetts, as applied to foreign corporations, including the petitioner, which have real estate and other property situated wholly outside of Massachusetts, is unconstitutional and void under the Federal Constitution, because subjecting their property situated outside of Massachusetts to taxation, and in undertaking to make the payment of a tax upon property beyond the borders of the State a condition of retaining or securing the right to transact local or intrastate business within the limits of Massachusetts, and in thus depriving them of their property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution (12th Ass't Errors, S. S. White, Rec. 32; 5th Ass't Errors, Baltic, Rec. 20).

8. In refusing to rule, pursuant to the 8th request (S. S. White, Rec. 15; see 4th request, Baltic, Rec. 11), as follows:—

"This excise tax is unconstitutional and void because it violates the 'equal protection of the laws' clause of the Fourteenth Amendment, in that it creates an arbitrary and unreasonable classification between foreign corporations on the one hand and domestic corporations transacting the same kind of business on the other hand, taxing the former by a different and much more onerous rule than is used in taxing domestic corporations for the same privi-

lege" (13th Ass't Errors, S. S. White, Rec. 32; 5th Ass't Errors, Baltic, Rec. 20).

9. In refusing to rule, pursuant to the 6th request (S. S. White, Rec. 14), as follows:—

"That upon the allegations of the petition and the agreed facts it must be ruled as matter of law that sales or contracts for the sale of goods manufactured or located in one State for delivery in other States, constitute interstate commerce, or transactions involving interstate commerce, irrespective of the fact that the transportation or delivery of such goods is performed by common carriers. The goods covered by such sales or contracts of sale are subjects of interstate commerce. The business of selling the same involves interstate commerce. The place of business or office where such sales are made or negotiated or deliveries thereunder superintended, is one of the means or instrumentalities of interstate commerce. Such sales or contracts of sale, the goods sold thereunder, the business of selling them and the office or place of business where sold are each and all under the protection of the 'commerce clause' of the Federal Constitution, regardless of the question whether the seller is a transportation company or common carrier. Transportation and delivery are merely means or instrumentalities of interstate commerce. A company merely selling goods for delivery in other States is engaged in interstate commerce" (11th Ass't Errors, S. S. White, Rec. 31, 32).

BRIEF OF ARGUMENT.

I.

THE MASSACHUSETTS STATUTE IS VOID, BECAUSE REPUGNANT TO THE "COMMERCE" AND "DUE PROCESS" CLAUSES OF THE FEDERAL CONSTITUTION.

A.

A STATE CANNOT LAWFULLY IMPOSE AN EXCISE MEASURED BY THE ENTIRE CAPITAL STOCK OF A FOREIGN CORPORATION ENGAGED IN INTERSTATE COMMERCE, AS A CONDITION OF ITS RIGHT TO TRANSACT DOMESTIC BUSINESS.

SUCH A MEASURE, IN ITS NECESSARY EFFECT AND OPERATION, DIRECTLY AND SUBSTANTIALLY BURDENS INTERSTATE COMMERCE. IT IS, THEREFORE, A REGULATION OF SUCH COMMERCE AND VOID, BECAUSE REPUGNANT TO THE "COMMERCE" CLAUSE.

THE UNCONSTITUTIONALITY OF THE MASSACHUSETTS EXCISE, UNDER THE "COMMERCE" CLAUSE, IS CONCLUSIVELY SETTLED BY THE PRINCIPLES ESTABLISHED IN THE WESTERN UNION AND PULLMAN CASES (216 U. S. 1, 56).

THESE CASES ALSO CONCLUSIVELY DETERMINE THAT THE MASSACHUSETTS STATUTE IS UNCONSTITUTIONAL, BECAUSE IT VIOLATES THE "DUE PROCESS" CLAUSE BY TAXING PROPERTY OUTSIDE OF THE STATE, FOR THAT IS THE NECESSARY EFFECT AND OPERATION OF AN EXCISE MEASURED BY A COMPANY'S ENTIRE CAPITAL, REPRESENTING ITS PROPERTY BOTH WITHIN AND WITHOUT THE STATE.

A State statute which imposes an excise *measured* by the entire capital stock of a foreign corporation engaged, to a substantial extent, in interstate commerce, is unconstitutional and void, because repugnant to the "commerce

clause" of the Federal Constitution, even though, upon its face, the tax be imposed exclusively for the privilege of transacting domestic commerce.

This is conclusively settled by *Western Union Telegraph Co.* v. *Kansas* (216 U. S. 1) and *Pullman Company* v. *Kansas* (216 U. S. 56).

An excise measured by the entire capital stock of a foreign corporation engaged in interstate commerce and having property outside of the taxing State is also unconstitutional and void, because it conflicts with the "due process" clause.

This is also conclusively settled by the Western Union and Pullman cases (*supra*).

The above decisions were rested upon both grounds. The Kansas excise was there held unconstitutional for two distinct reasons:—

(1) Because it was repugnant to the "commerce" clause, in that it violated the right secured by the Federal Constitution, giving to Congress the exclusive power to regulate interstate commerce, for such an excise, being based upon the entire authorized capital, in its necessary effect and operation constitutes a direct and substantial burden upon the interstate portion of the company's business, even though professedly exacted for the privilege of transacting domestic business.

(2) Because an excise measured by the entire capital also violates the "due process" clause, for in its necessary operation and effect it undertakes to tax property beyond the limits of the taxing State, inasmuch as its capital necessarily represents its property everywhere, both within and without the State.

That these decisions rest upon both grounds is fully shown in the later statements of the Court as to their meaning.

Ludwig v. *Western Union Telegraph Co.*, 216 U. S. 146.

Western Union Telegraph Co. v. *Andrews*, 216 U. S. 165.

Southern Railway Co. v. *Greene*, 216 U. S. 400.
Flint v. *Stone Tracy Co.*, 220 U. S. 107, 163.
Atchison, etc., Ry. Co. v. *O'Connor*, 223 U. S. 280, 285.

The Massachusetts excise differs, in no material respect, from the Kansas excise condemned in the Western Union and Pullman cases. If these decisions mean what they state, upon their face, and what this Court has since stated as to their grounds and scope, no further argument is required to show the unconstitutionality of the Massachusetts excise.

The Court below held that they were decided upon wholly different grounds from those stated upon their face.

In the opinions below it is claimed, so far as the "commerce" clause is concerned, (1) that these decisions are limited in their scope to *quasi*-public corporations and do not extend to other classes of interstate commerce corporations, such as mercantile, trading, manufacturing, and mining companies engaged in transacting interstate sales of goods; and

(2) that the principle of these decisions is further confined to those *quasi*-public corporations which transact an interstate business so intertwined with its domestic commerce that the latter cannot be abandoned without serious detriment to the former.

If these decisions do not rest upon these grounds and are not thus limited in their scope, nothing further need be said, and the Massachusetts excise must necessarily fall, because it conflicts with the "commerce" clause, for it cannot successfully be distinguished from the Kansas excise.

As to the "due process" clause, the Court below does not even attempt to show how this excise is distinguishable from the Kansas excise in its necessary effect of taxing property outside of the State.

In *Pullman Co.* v. *Kansas* (216 U. S. 56) the real grounds

for these decisions are thus stated in the opinion of the Court rendered by Mr. Justice Harlan (pp. 62, 63):—

> "That the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the State a specified per cent. of its authorized capital, was a violation of the Constitution of the United States, in that such a single fee, based as it was on all the property, interests and business of the company, within and out of the State, was, in effect, a tax both on the interstate business of that company, and on its property outside of Kansas, and compelled the company, in order that it might do local business in Kansas in connection with its interstate business, to waive its constitutional exemption from State taxation on its interstate business and on its property outside of the State and contribute from its capital to the support of the public schools of Kansas; that the State could no more exact such a waiver than it could prescribe as a condition of the company's right to do local business in Kansas that it agree to waive the constitutional guaranty of the equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law."

In his concurring opinion Mr. Justice White said (pp. 68, 69):—

> "As it is obvious that the Pullman Company, in so far as it was engaged in interstate commerce within the State of Kansas, was independent of the will of the State, it follows that the State had no absolute power to exclude the corporation, and therefore no authority to impose an unconstitutional burden as the price for the privilege of doing local in conjunction with the interstate commerce business. . . . The imposition on a corporation which has the right to do interstate commerce business within the State of an unconstitutional burden for the privilege of doing local business is, in my opinion, the exact equivalent of placing a direct burden on its interstate commerce business."

The grounds and scope of these decisions have been explicitly stated in later cases:—

In *Southern Railway Co.* v. *Greene* (216 U. S. 400) Mr. Justice Day says (p. 416):—

> "In the *Western Union Telegraph case* it was held that a State could not impose a tax upon an *interstate commerce corporation* as a condition of its right to do domestic business within the State, which tax included within its scope the entire capital of the corporation, without as well as within the borders of the State. The Kansas tax was sought to be sustained as a legal exaction for the *privilege of doing domestic business* within the State. It was held invalid because it violated the right secured by the Constitution of the United States, giving to Congress the exclusive power to regulate interstate commerce, and because it violated the due process clause of the Federal Constitution in undertaking to make the payment of a tax upon property beyond the borders of the State a condition of doing domestic business within the State."

This language is clear and unmistakable. It covers, in terms, all "interstate commerce" corporations. It is not limited to telegraph, palace car, and similar *quasi*-public corporations. No reference is made here or in the decisions themselves to the factor which the Court below deemed vital to the decisions; namely, the consideration that the telegraph company had a permanent plant in Kansas, and, consequently, its domestic business in that State could not voluntarily be abandoned without serious injury to its interstate commerce.

In *Ludwig* v. *Western Union Telegraph Co.* (216 U. S. 146) the Western Union and Pullman decisions and the grounds therefor are restated by Mr. Justice Harlan (p. 163):—

> "On the authority of the *Kansas cases*, and for the reasons stated in the opinions therein, we hold the statute in question to be unconstitutional and void,

as illegally burdening interstate commerce and imposing a tax on property beyond the jurisdiction of the State.". . .

"If a statute, by its necessary operation, really and substantially burdens the interstate business of a foreign corporation seeking to do business in a State, or imposes a tax on its property outside of such State, then it is unconstitutional and void, although the State Legislature may not have intended to enact an invalid statute" . . . (p. 162).

"The capital stock of the company represents, we repeat, all its business, property and interests throughout the United States and foreign countries, and the requirement that the company, engaged in interstate commerce, may continue to do a local business in Arkansas, and escape the heavy penalties prescribed, must pay a given amount (in this case $25,000.), based on all its capital stock, merely for filing its articles of incorporation with the Secretary of State, is, in effect, a direct burden and tax on its interstate business, as well as on its property outside of the State" (p. 163).

In *Flint* v. *Stone Tracy Co.* (220 U. S. 107) Mr. Justice Day says (p. 163):—

"In the *Western Union Telegraph Case* the State undertook to levy a graded charter fee upon the entire capital stock of one hundred millions of dollars of the Western Union Telegraph Company, a foreign corporation, and engaged in commerce among the States, as a condition of doing local business within the State of Kansas. This court held, looking through forms and reaching the substance of the thing, that the tax thus imposed was in reality a tax upon the right to do interstate business within the State, and an undertaking to tax property beyond the limits of the State; that whatever the declared purpose, when reasonably interpreted, the necessary operation and effect of the act in question was to burden interstate commerce and to tax property beyond the jurisdiction of the State, and it was therefore invalid."

In *Atchison, etc., Ry. Co.* v. *O'Connor* (223 U. S. 280) Mr. Justice Holmes says (p. 285):—

> "It is obvious that the tax is of the kind decided by this court to be unconstitutional, since the decision below in the present case, even if the temporary forfeiture of the right to do business declared by the statute be confined by construction, as it seems to have been below, to business wholly within the State" (citing the *Western Union*, *Pullman* and *Ludwig* cases).

B.

THE WESTERN UNION AND PULLMAN CASES AND DECISIONS FOLLOWING THEM CONCLUSIVELY SETTLE THE PROPOSITION THAT THE NECESSARY EFFECT OF AN EXCISE BASED ON THE ENTIRE CAPITAL OF AN INTERSTATE COMMERCE CORPORATION IS TO BURDEN DIRECTLY AND SUBSTANTIALLY THE INTERSTATE PORTION OF ITS BUSINESS, EVEN THOUGH PROFESSEDLY IMPOSED FOR THE PRIVILEGE OF TRANSACTING DOMESTIC BUSINESS.

IF THAT WAS THE NECESSARY RESULT AS TO THE PULLMAN AND WESTERN UNION COMPANIES, THE SAME EXCISE INEVITABLY HAS THE SAME EFFECT UPON ALL INTERSTATE COMMERCE CORPORATIONS.

THE MERE FACT THAT A COMPANY IS NOT A *quasi*-PUBLIC CORPORATION CANNOT ALTER THE NECESSARY EFFECT AND OPERATION OF SUCH AN EXCISE.

THESE DECISIONS ALSO CONCLUSIVELY SETTLE THE PROPOSITION THAT THE NECESSARY EFFECT OF SUCH AN EXCISE UPON AN INTERSTATE COMMERCE CORPORATION IS TO TAX ITS PROPERTY LOCATED BEYOND THE BORDERS OF THE TAXING STATE.

AS THE NECESSARY EFFECT AND OPERATION OF THE MASSACHUSETTS STATUTE MUST BE PRECISELY LIKE THOSE RESULTING FROM THE KANSAS STATUTE, IN THE SAME TERMS,

THE MASSACHUSETTS EXCISE IS UNCONSTITUTIONAL UPON BOTH GROUNDS.

Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1.
Pullman Co. *v.* Kansas, 216 U. S. 56.

In these cases the Kansas statute was held to be unconstitutional which imposed a graduated charter tax which, in the case of corporations having $1,000,000 or more of capital stock, amounted to $200 per million, or one-fiftieth of one per cent. of the "authorized capital." This was a charter fee imposed once for all at the time of filing its charter, and thus procuring the right to transact domestic business. The Massachusetts excise is an *annual* tax of one-fiftieth of one per cent. of the "par value of its authorized capital stock," with a maximum tax of $2,000.

In terms, and even as to the percentage exacted, the Kansas and Massachusetts excises are, in all material respects, precisely alike. They differ only in the fact that the Massachusetts excise is an *annual* tax, with a fixed maximum.

The payment of the excise, in each case, is exacted as a condition of granting the privilege to transact domestic business in connection with interstate commerce.

The Kansas statute expressly so provided.

The Massachusetts statute, though, in terms, directed against all kinds of business transacted by foreign corporations, has reached the same result through judicial construction.

The facts of the *Pullman* and *Western Union* cases were substantially alike, except for the fact, apparently not appreciated by the Court below, that the *Pullman Company* possessed no permanent plant or investments whatsoever within the limits of Kansas.

The *Pullman* case was *quo warranto* brought against the Pullman Company, a foreign corporation, alleging that the company was unlawfully doing an intrastate business with-

in the limits of Kansas, consisting of charging compensation, for the use of reserved seats and sleeping berths and for the service of meals, to "passengers transferring upon railroads from places within the State to other places within the State."

A decree was rendered in the court below, ousting the Pullman Company from the transaction of "any business of a domestic or intrastate character within the State of Kansas." The decree declared that it "should in no wise affect or restrict the interstate business of the Company."

Under the Kansas statute, known as the Bush Act, the company had made application for permission to engage in domestic business in Kansas. The Charter Board granted the application, authorizing the company to transact its business *within* the State of Kansas, with the proviso that the order should not take effect until the Pullman Company had paid to the State Treasurer, for the benefit of the permanent school fund, the sum of $14,800, being the charter fees necessary to be paid by a corporation, with a capital of $74,000,000, seeking to do business in that State. The order specifically provided that nothing therein contained should be construed as restricting in any wise the interstate business of the company, and that "this grant of authority and requirement as to payment relate only to the business transacted *wholly within* the State of Kansas."

This excise tax, being *measured* by the company's entire authorized capital, precisely like the Massachusetts tax, represented, in its necessary operation and effect, *all* its business and property everywhere, both interstate and domestic, as was held by the Court.

The Court stated (p. 62):—

> "It does not appear how much of the single 'fee' demanded by the State is to be referred to the interstate business of the company nor how much to its property outside of the State nor what part has reference to its intrastate business or to its property within the State."

The Court held the Kansas excise to be unconstitutional and void upon two distinct grounds:—

First. That it was repugnant to the "commerce" clause of the Federal Constitution, because, although the statute professed to exact the tax for the privilege of transacting domestic business, the tax was *measured* by the company's entire capital, which necessarily represented its whole business, both interstate and domestic, and such a *measure*, in its necessary effect and operation, constituted a direct and substantial burden upon and, consequently, a regulation of the interstate commerce of the company.

Second. That the excise was also in violation of the "due process" clause, because, being a tax measured by its entire capital, and thus representing its property both within and without the State, the excise necessarily taxed its property located beyond the limits of Kansas.

The real ground for these decisions was that the *measure* of the Kansas tax was erroneous, when applied to *interstate commerce corporations.*

If the necessary effect of an excise measured by the entire capital is, as was decided, to burden directly and substantially interstate commerce and to tax property located outside the State, as applied to the interstate corporations there involved, precisely the same effect must result from the same excise when applied to any other class of *interstate commerce corporations.* No reason can be suggested why such an effect, resulting from exactly the same excise, should be limited to corporations like the Pullman and Western Union companies. Clearly, no suggestion of any such limitation appears either in the decisions themselves or in the cases which have followed them. Nor can any reason be presented why the Kansas tax would have been any less unconstitutional if a maximum limit had there been provided.

But the maximum limit has no application to the companies now before the Court. Both the Baltic and S. S.

White companies are taxed at the rate of one-fiftieth of one per cent. of their total authorized capital.

If amount were important, the Massachusetts tax obviously is more burdensome than the Kansas statute. In Massachusetts a $10,000,000 corporation, at the rate of one-fiftieth of one per cent., would *annually* pay the exact amount of the maximum tax. It would pay the same amount, as a charter fee, and once for all in Kansas. In Massachusetts a $10,000,000 corporation pays precisely the same annual tax as a $100,000,000 company.

The Massachusetts excise is exacted in addition to local property taxes upon land, merchandise, and machinery.

Both the Kansas and the Massachusetts taxes are admittedly excises, and not property taxes in any sense.

The Massachusetts Court in the *S. S. White* case (212 Mass. p. 35) proved at great length the uncontroverted proposition that the Massachusetts tax is an excise, and not a property tax,—a conclusion which has always been and still is fully admitted by the plaintiff in error.

Our contention is that the Massachusetts statute, *considered as an excise*, is open to precisely the same constitutional objections as the Kansas excise which was condemned in the *Western Union* and *Pullman* cases.

These decisions are controlling here.

Their reasoning is not confined to *quasi*-public corporations. The consideration whether or not the companies possessed permanent investments in Kansas is nowhere referred to in the opinion of the Court.

In fact, the Pullman Company possessed no fixed plant or investments whatsoever permanently located in Kansas.

Nor was the factor there regarded as material, or even considered, whether they might or might not abandon their domestic business without serious injury to their interstate commerce.

Nor did the Court even allude to the question whether the domestic business was inextricably intertwined with

the interstate commerce. Yet these are the grounds upon which the decisions are based, according to the views of the Court below.

Ludwig *v.* **Western Union Tel. Co., 216 U. S. 146.**

Western Union Tel. Co. *v.* **Andrews, 216 U. S. 165.**

In these cases the Arkansas foreign corporation excise tax was held to be unconstitutional and void which required a foreign corporation engaged in interstate commerce to pay a license fee based upon its entire capital stock, whether employed within or without the State, as a condition of the privilege to engage in domestic commerce, because the statute was repugnant to the "commerce" and also the "due process" clause.

Atchison Ry. Co. *v.* **O'Connor, 223 U. S. 280.**

In this case the Colorado statute, imposing an excise or license fee upon foreign corporations which amounted to two cents on each $1,000 of the company's capital stock, was held to be unconstitutional, as applied to a foreign corporation engaged partly in interstate and partly in domestic commerce, although, by construction of the State Court, the excise was exacted for the privilege of transacting domestic business.

H. K. Mulford Co. *v.* **Curry, 44 Cal. 80.**

This case directly decides that the principles of the Western Union and Pullman decisions are not confined to *quasi*-public corporations, but cover all kinds of ordinary trading corporations engaged partly in interstate and partly in domestic commerce.

C.

ERRONEOUS VIEWS OF MASSACHUSETTS COURT AS TO GROUNDS AND LIMITATIONS OF WESTERN UNION AND PULLMAN DECISIONS.—IT IS CLAIMED THAT THEY ARE LIMITED (1) TO *quasi*-PUBLIC CORPORATIONS AND (2) TO CASES WHERE THE INTERSTATE COMMERCE IS SO INTERTWINED WITH THE DOMESTIC BUSINESS THAT THE LATTER CANNOT VOLUNTARILY BE ABANDONED WITHOUT SERIOUS DETRIMENT TO THE FORMER.—NO JUSTIFICATION FOR THIS THEORY.

The views of the Court below as to the grounds and scope of the Pullman and Western Union decisions differ widely from their real meaning and effect, as stated by this Court (*supra*, A). According to the Massachusetts Court, they rest upon grounds not mentioned by this Court, either in the decisions themselves or in the cases following them.

The Massachusetts Court says (S. S. White case, 212 Mass. 35):—

> "The principle established by these decisions is that the court, looking through the form of a statute to its substance, will ascertain whether in truth the impost is a direct tax upon interstate commerce, whatever may be the guise under which it is levied, and applying this rule, statutes under consideration in each of these cases requiring of all foreign corporations payment of a certain percentage of their entire capital stock were found to be a direct burden upon that portion of the corporate capital engaged in interstate commerce, and hence void.
>
> "There are at least two important, and as we think vital, distinctions between these cases and the one at bar. The first is that these cases all relate to corporations directly engaged *for hire* in transportation of intelligence or commerce or persons between the States; and their capital invested in this business was of such a *permanent* and fixed nature that the local business could not be given up without impairing their capacity to transact efficiently their interstate business. Their

> main business was interstate commerce of a quasi-public character. . . . The second distinction between our statute and those under consideration in the federal cases last cited is that the maximum fee allowed by our statute is $2,000" (S. S. White, Rec. 22, 23).

As thus stated, the *Western Union* and *Pullman* decisions and their real grounds and scope become wholly unrecognizable.

In the opinion of this Court, no reference whatever was made to the *quasi*-public character of telegraph and sleeping car companies. They were mentioned simply as *interstate commerce corporations*, and as such entitled to the protection of the "commerce" clause and for no other reason. If these factors were so vital to the decision, it is strange that they were nowhere alluded to either in the decisions themselves or in the later cases where this Court has taken occasion to state the grounds upon which these decisions rest.

While, it is true, the Western Union Company's capital was invested in property of a "permanent and fixed nature," the fact was otherwise with respect to the Pullman Company, which, if it chose to abandon local business, had only to roll its cars outside of the State. That company had no stations, offices, or other fixed investments whatsoever permanently located in Kansas.

The Massachusetts Court holds that all kinds of interstate commerce corporations, whether trading, manufacturing, or *quasi*-public companies, come within the protection of the "commerce" clause, provided that they carry on in Massachusetts nothing but interstate commerce. The statute does not apply to corporations engaged exclusively in interstate commerce.

> *Atty. Gen'l* v. *Electric, etc., Co.*, 188 Mass. 239.
> *Baltic, etc., Co.* v. *Commonwealth*, 207 Mass. 381.
> *S. S. White, etc., Co.* v. *Commonwealth*, 212 Mass. 35.
> *Keystone, etc., Co.* v. *Commonwealth*, 212 Mass. 50.

But, on the other hand, the same cases hold that interstate commerce corporations, engaged in a trading, manufacturing, or mining business, are not protected by the "commerce" clause, when they transact domestic business in connection with their interstate commerce. In such case only *quasi*-public corporations come within the protection of the "commerce" clause. These decisions might, indeed, almost be regarded as self-contradictory in this respect.

But, in any event, it would be difficult to cite any decisions of this Court in support of such an arbitrary and unwarrantable distinction.

The Court below lays great stress upon a statement made by Mr. Justice Harlan in the Western Union case, in which he refers to "ordinary business." These words are distorted from their real meaning, and made to support a proposition directly the opposite of that intended. The Court below, having stated that the Pullman and Western Union decisions apply only to *quasi*-public corporations, continues:

> "It follows that our statute applies to corporations engaged in the transaction of *ordinary business* within the State. It comes precisely within the statement of law in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, made by the court, speaking through Mr. Justice Harlan, at page 33: 'It is true that in many cases the general rule has been laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people. But those were cases in which the particular foreign corporation before the court was engaged in *ordinary business* and not directly or regularly in interstate or foreign commerce" (White, Rec. 23).

It is obvious that, in using the term "ordinary business," the learned justice meant to refer to *ordinary domestic com-*

merce, as contrasted with "interstate or foreign commerce." There was certainly no intention of contrasting ordinary trading or manufacturing companies with *quasi*-public corporations. The Court merely stated that the cases cited were cases of ordinary domestic business, where no question of interstate commerce was in any manner involved. Therefore, the State might properly impose such taxes and conditions upon the privilege of engaging in domestic business as it might see fit.

We submit that the Massachusetts Court, in thus limiting the application of the *Western Union* and *Pullman* decisions to *quasi*-public corporations, and, further, to a special class of such corporations having their interstate and domestic business and property inextricably intertwined, has wholly misconceived the meaning and effect of these decisions, for the following reasons:—

(1) Because no suggestion as to any such limited effect can be pointed out anywhere in the decisions themselves;

(2) Because in the later statements made by this Court regarding the grounds and scope of these decisions no such limitation appears.

(3) Because no adequate reason can be presented why the "commerce" clause should not include within its protection all interstate commerce corporations, instead of merely *quasi*-public companies, where an excise tax is involved, when, on the other hand, it is settled that this clause protects trading corporations engaged in interstate commerce, where occupation and privilege taxes are levied against them or their agents.

(4) Because no authorities can be cited in support of such limitations, but, on the contrary, long before the Western Union and Pullman cases, the "commerce" clause had repeatedly been held to apply to *all* classes of interstate commerce corporations, wherever the particular tax imposed a direct and substantial burden on interstate commerce.

Where it has that effect, the tax is unconstitutional, even though the company is not a *quasi*-public corporation.

(5) The *Western Union* and *Pullman* cases conclusively determine that an excise based on the entire capital, by its necessary operation and effect, directly and substantially burdens the interstate commerce of the company. It is therefore a regulation of interstate commerce, and as such unconstitutional, because in violation of the "commerce" clause.

(6) These attempted distinctions have no reference to the "due process" clause. Even if the distinctions could be supported, the Massachusetts excise is still unconstitutional, because it violates the "due process" clause, under the principles of the Western Union and Pullman cases.

II.

PRIOR TO THE WESTERN UNION AND PULLMAN DECISIONS IT WAS ESTABLISHED LAW THAT ANY OCCUPATION OR PRIVILEGE TAX, LICENSE FEE, OR OTHER EXCISE, WHICH DIRECTLY AND SUBSTANTIALLY BURDENS INTERSTATE COMMERCE, IS UNCONSTITUTIONAL. THE NECESSARY OPERATION AND EFFECT OF THE EXCISE IS THE ESSENTIAL INQUIRY, THOUGH THE TAX IS PROFESSEDLY EXACTED FOR A LOCAL PRIVILEGE. WHERE A TAX NECESSARILY AFFECTS AND BURDENS INTERSTATE COMMERCE, ITS EFFECT CANNOT BE ALTERED BY THE MERE FACT THAT THE CORPORATION IS NOT A *quasi*-PUBLIC CORPORATION.

Irrespective of the Western Union and Pullman cases, the earlier decisions, when properly understood, determine the unconstitutionality of the Massachusetts excise. It is settled law that, *where no question of interstate commerce is involved*, a State may, at its pleasure, totally exclude foreign corporations from its limits, or admit them to the privilege

of transacting domestic business upon such terms and conditions as it may deem best.

Osborne v. *Florida*, 164 U. S. 650.
Pullman Co. v. *Adams*, 189 U. S. 420.
Allen v. *Pullman Co.*, 191 U. S. 171.
Horn Silver Mining Co. v. *New York*, 143 U. S. 305.
Pembina, etc., Co. v. *Pennsylvania*, 125 U. S. 181.

These are the main cases relied upon by the Court below for its decision. But in none of these cases was interstate commerce involved. They have no application to a case where the necessary effect and operation of the excise is to burden interstate commerce directly and substantially.

That excises like the Kansas and Massachusetts taxes have this necessary result was conclusively determined in the *Western Union* and *Pullman* cases.

A State may tax the property of a foreign corporation which is permanently located within its limits, when the ascertainment of the amount depends, in fact, on the value of such property.

Postal Telegraph Co. v. *Adams*, 155 U. S. 688, 696.
Leloup v. *Mobile*, 127 U. S. 640, 649.

An interstate commerce corporation entering a State for the purpose of transacting business is subject to all local regulations which only *incidentally* affect its business, but are established for the protection, comfort, and convenience of the people, and are not, in any real sense, in conflict with the substantial rights of those engaged in interstate commerce, but are referable to the police powers of the

State and to be respected until Congress covers the subject by legislation.

Cooley v. *Board of Wardens, etc.*, 12 Howard, 299.
Smith v. *Alabama*, 124 U. S. 465.

But, where questions of interstate commerce are involved, the powers of the State to exclude, regulate, or burden foreign corporations are lost. There the power of the State becomes "relative" instead of "absolute."

A State statute requiring that a foreign corporation, as a condition of obtaining permission to transact domestic business, must waive its constitutional right to litigate in the Federal Courts, is unconstitutional under the "commerce" clause.

Southern Pacific Co. v. *Denton*, 146 U. S. 202.
Barron v. *Burnside*, 121 U. S. 186.
Insurance Co. v. *Morse*, 20 Wall. 445.
Martin v. *B. & O. R.R. Co.*, 151 U. S. 673.
St. Clair v. *Cox*, 106 U. S. 350.
Barrow Steamship Co. v. *Kane*, 170 U. S. 100.

Such a statute is also unconstitutional under the "equal protection of the laws" clause, where the condition is imposed upon foreign corporations which have already entered the State and acquired investments therein.

Herndon v. *Chicago, etc., Ry.*, 218 U. S. 135.

If a State statute, by its necessary effect and operation, directly and substantially burdens the interstate business of a foreign corporation, the statute is unconstitutional, even though upon its face it purports merely to make a charge, by way of license fee or excise, for the privilege of transacting domestic business.

See cases *infra* (V.).

According to well-settled rules of construction, the purpose of a statute, whatever its language, must be determined by its natural and reasonable effect.

Henderson v. *Mayor*, 92 U. S. 259, 268.
Brimmer v. *Rebman*, 138 U. S. 78.

This Court always looks through the forms and attempts to reach the substance.

> "Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

Galveston, etc., Ry. v. *Texas*, 210 U. S. 217, 227.

Where a foreign corporation is engaged in transacting both interstate and domestic commerce, an excise measured by its gross receipts is clearly unconstitutional, unless a *bona fide* attempt is made either to apportion the tax between the domestic and interstate receipts or to confine the tax to local property and the receipts therefrom.

Ratterman v. *Western Union Tel. Co.*, 127 U. S. 411.
Leloup v. *Port of Mobile*, 127 U. S. 640, 647.
Crutcher v. *Kentucky*, 141 U. S. 47.
Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S. 196.
Galveston, etc., Ry. Co. v. *Texas*, 210 U. S. 217.

The measure of the Massachusetts excise embraces indiscriminately interstate and domestic capital, business and property, without any attempt at apportionment.

In such cases there must be an "actual attempt to reach

the property and to let the interstate traffic and the receipts from it alone."

Galveston, etc., Ry. v. *Texas*, 210 U. S. 217, 227.
Fargo v. *Hart*, 193 U. S. 490.
Meyer v. *Wells, Fargo & Co.*, 223 U. S. 298.

Such excises, however, are constitutional, where it appears that a *bona fide* attempt has been made to apportion the excise between the interstate and domestic business or receipts, or where the tax for a purely local privilege is measured by the proportionate amount of property or capital which is used in domestic business.

Western Union Tel. Co. v. *Mass.*, 125 U. S. 530.
Pullman Company v. *Adams*, 189 U. S. 420.
Allen v. *Pullman Company*, 191 U. S. 171.
Pickard v. *Pullman Company*, 117 U. S. 54.

Of this character is the Massachusetts legislation regarding railroad, telegraph, telephone, electric railway, and express companies, and the like, which is clearly open to no constitutional objection. (See Baltic case, 207 Mass. 381, 386.)

III.

THE THEORY OF THE MASSACHUSETTS COURT THAT THE PRINCIPLES OF THE PULLMAN AND WESTERN UNION CASES HAVE NO APPLICATION WHERE THE COMPANY IS FREE TO RENOUNCE OR ABANDON ITS DOMESTIC BUSINESS, AND ONLY APPLY WHERE THE INTERSTATE AND DOMESTIC BUSINESS ARE INEXTRICABLY INTERWOVEN, HAS NO SUPPORT IN REASON OR UPON THE AUTHORITIES.

THIS THEORY IS NOT SUPPORTED BY ANY OF THE CASES CITED BY THE COURT BELOW, BECAUSE IN NONE OF THEM WAS INTERSTATE COMMERCE INVOLVED. IF THEY DID SUP-

PORT THIS THEORY, THEY ARE IN CONFLICT WITH THE WESTERN UNION AND PULLMAN DECISIONS, AND MUST BE REGARDED AS OVERRULED THEREBY.

Pullman Company v. *Adams*, 189 U. S. 420, DID NOT INVOLVE INTERSTATE COMMERCE.

Pullman Co. *v.* **Adams, 189 U. S. 420.**

This case is the main reliance for the refinements and distinctions appearing in the decisions of the Court below.

They appear to have been derived by inference from a *dictum* in that case, where the Court said (p. 422), "The company cannot complain of being taxed for the privilege of doing a local business which it is *free to renounce*."

No question of interstate commerce was there involved.

As the effect of that case is stated by Mr. Justice Harlan in the Western Union case (216 U. S. 1, 41):—

> "The Court did not hold that the State could, in any form, directly burden interstate commerce. It really held to the contrary."

In the Adams case the tax was held constitutional.

In the Pullman decision (216 U. S. 56) the same company was involved. It was equally "free to renounce" its local business, but the tax was there held unconstitutional.

If this should be regarded as a material factor, the decisions are irreconcilable. One of two results must follow: (1) either this factor is wholly immaterial, or (2) the Adams case was overruled by the Western Union and Pullman decisions.

The Court, in these decisions, chose the former alternative and found no occasion to overrule the Adams case, (1) because the Adams case involved no question of interstate commerce and (2) because the measure of the excise was perfectly proper, when exacted for a local privilege, being $100 for each car used in local business and also 25

cents per mile for each mile of railroad track used in domestic commerce.

Such a measure is totally different from an excise based upon the entire capital of the company, which necessarily represents its interstate as well as its domestic business.

In its necessary effect and operation such an excise directly and substantially burdens the interstate commerce. If so, it is void, wholly irrespective of the consideration that the company might voluntarily abandon its domestic business without serious loss.

If the Pullman case was decided, as the Court below held, upon the ground that the Pullman Company was *not* "free to renounce" its domestic commerce without serious injury, then the Adams case, involving the same company, should have been decided in the same way. But there, on the contrary, the tax was held constitutional.

The necessary effect of a tax based upon the entire capital is not changed merely because a trading corporation happens to be involved instead of a telegraph or sleeping car company. Its interstate capital and business must be affected and burdened in precisely the same manner, where an excise of the same kind is imposed. Nor can the necessary effect and operation of such an excise be changed by reason of the fact that the company might abandon its local business without serious loss.

Suppose it were true, as stated by the Court below, that the Western Union case rests upon the ground that the telegraph company possessed a large and permanent investment in Kansas devoted to domestic business and inextricably intertwined with its property used in interstate commerce. But exactly the reverse appeared with reference to the sleeping car company in the Pullman case. The Pullman Company possessed no permanent plant, stations, or offices in Kansas. Its interstate business and capital was not so inextricably interwoven with its domestic business and capital that the latter could not be abandoned

without serious injury to the former. Its local traffic was quite easily separable from its interstate commerce, as was seen in the Adams case.

If it desired to renounce its domestic commerce, all it had to do was to refuse to accept passengers passing from one point to another within the State. As pointed out by Mr. Justice Holmes in his minority opinion, the investment of the Pullman Company in Kansas consisted merely of the temporary "presence in the State of cars that can be and are rolled out of it at will" (216 U. S. 56, 75). That company was fully as "free to renounce" its local business as the same company was in the Adams case. The Pullman Company could have suffered no more damage than the S. S. White or Baltic companies if the local business had been renounced. The latter companies would have suffered damage to their more or less permanent investment in leased offices, and trade or tenant's fixtures. They differ, even from telegraph companies, only with respect to the degree of loss.

In any event the *Pullman* case involved facts quite different from those appearing in the *Western Union* case. The Kansas statute was held unconstitutional as to the Pullman Company, even though it had no permanent investments in that State and was "free to renounce" its domestic business.

The theory of the Court below is apparently derived, as a corollary, from the above *dictum* in the Adams case. Confessedly, nothing of the kind appears in the opinion of the Court in the Western Union and Pullman decisions.

Indeed, in the Adams case the distinction is not referred to, unless the above *dictum* can properly be said to bear such an extended interpretation. The statement was there made with reference to the contention that the Pullman Company, under the Constitution of the State, could be compelled to run its sleeping cars for the purposes of domestic commerce.

The Court, in rejecting this contention, stated that the company was "free to renounce" intrastate traffic, and, accordingly, treated the case as an excise exacted for the local privilege of transacting domestic commerce, no question of interstate commerce being involved.

The theory of the Court below is that an excise of this kind is always constitutional, if the company can renounce or abandon its domestic business without serious injury to its interstate commerce, but is unconstitutional, if it cannot do so, where the company involved is a *quasi*-public corporation.

This theory can hardly be sound, in view of the Pullman decision, where the Pullman Company was just as "free to renounce" domestic business as it was in the Adams case.

Contrary to this theory, the separability of interstate and domestic receipts has been considered an important reason for holding an excise to be unconstitutional, where the interstate and domestic receipts are taxed indiscriminately and without attempt at apportionment.

> *Ratterman* v. *Western Union Tel.*, 127 U. S. 411.
> *Leloup* v. *Port of Mobile*, 127 U. S. 640.
> *Crutcher* v. *Kentucky*, 147 U. S. 47.

It is true that a corporation possessed of a permanent investment, like manufacturing or telegraph companies, may suffer damage to a greater degree than a corporation owning assets, like sleeping cars, which are easily movable.

But, so long as the company continues to transact domestic business and does not renounce it, the charge for the privilege is a direct and substantial burden upon the interstate portion of its business, because that is the necessary effect of a tax measured by its entire capital, representing its business everywhere, both interstate and domestic, as was held in the Western Union and Pullman cases. Such an excise is based upon an erroneous measure.

If the measure be valid, the tax would be just as constitutional when applied to a corporation which was not "free to renounce" its local business. If the measure be invalid, it continues to be equally so, irrespective of the question whether the company may or may not so renounce its local business without serious injury to its interstate commerce. The measure of the excise and its effect and operation upon interstate commerce are the only material factors.

Allen *v.* **Pullman Co., 191 U. S. 171.**

The tax was properly measured in this case because interstate commerce was not aimed at or affected.

Here a tax of $3,000 per annum on sleeping car companies for the privilege of transporting passengers wholly within the State was upheld, and at the same time the Tennessee statute of 1887 was held unconstitutional, which imposed a tax on sleeping car companies doing business in the State, amounting to "$500 per car" annually, because it clearly applied to both interstate and domestic traffic.

The effect of this case is thus stated by Mr. Justice Harlan:—

> "It would seem to be too clear to admit of doubt that the principles in the *Allen* case are substantially those herein announced. Indeed, we could not hold otherwise than we do in the present case without overruling or materially modifying the principles announced in the *Allen* case" (216 U. S. 1, 44).

Kehrer *v.* **Stewart, 197 U. S. 60.**

In this case a statute was upheld which assessed an annual license fee of $200 "upon all agents of packing houses doing business in this State," the State Court having construed the statute as limited to the purely domestic trade of the agent.

The Court there stated (p. 65) that, if the statute had covered interstate shipments, it would be unconstitutional, for

> "a tax upon goods sold in another State, delivered to a common carrier and consigned to the purchaser in the State of Georgia, was an illegal interference with interstate commerce."

This statement of the Court refutes the proposition here advanced in behalf of the Commonwealth, that sales made in one State, for delivery in other States, do not constitute transactions of interstate commerce, because of the fact that the seller does not transport its own goods, but intrusts them to common carriers.

Osborne *v.* **Florida, 164 U. S. 650.**

In this case the Florida statute was upheld which imposed an annual license fee upon "all express companies doing business in this State," the tax varying according to the numbers of inhabitants in the city where the business was conducted. The fixed license fee was here $200.

As construed by the State Court, the excise was imposed for the privilege of doing local business, even though the company might at the same time be engaged in interstate business. As thus construed, the statute was held to be constitutional. No interstate commerce was here involved. A fixed license fee of $200 presents no similarity to an excise measured by the entire capital, representing both interstate and domestic business.

Mr. Justice Harlan treats this case as involving a tax for the privilege of transacting

> "domestic business within Florida, as measured by *the number of inhabitants of the city or town where the business was conducted.* It was not imposed on any basis that had reference either to the interstate business or to the property of the company outside of the State.

It imposed no burden whatever on interstate business, nor put any obstacle in the way of doing such business" (216 U. S. 1, 39).

Horn Silver Mining Co. *v.* New York, 143 U. S. 305.

In this case the facts presented no question involving interstate commerce. The license tax was there attacked by a foreign manufacturing corporation seeking to carry on in New York a manufacturing business, without payment of the license tax assessed for that privilege.

The company was a corporation established under the laws of Utah and there engaged in mining. The statutes of New York provided for a tax upon both domestic and foreign corporations "doing business in the State," subjecting them to a tax upon their "corporate franchise or business," at a certain percentage upon their capital stock, measured by their dividends. The defendant, by its answer, admitted that it was a manufacturing company carrying on manufacturing within the State of New York. The referee found that the corporation was engaged in business in New York. It appeared that the bullion taken by the company from its mines was shipped to Chicago, there refined, and thence forwarded to the United States Assay Office in New York, and that business was done by the company at its New York office, "such as is usually performed by corporations where their principal office" is situated.

While it appeared that the greater part of the business of the company was done without the State, and that the greater part of its capital was also located outside of the State, it did not appear that any *sales* of the company's products were made until after the product had reached New York. According to the facts, any sales must have been made in New York *after* the product had reached the United States Assay Office there. No commerce or sales

of any kind appeared other than sales and deliveries made and completely performed within the limits of New York. Consequently, no question as to interstate commerce was involved. While the contention appears to have been raised by counsel that the company was engaged in interstate commerce, the Court clearly did not treat any such question as involved.

Mr. Justice Field there states:—

> "The objection that it [the tax] operates as a direct interference with interstate commerce we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation. The products of the mine can be brought into the State and sold there without taxation, and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company" (143 U. S. 305, 317, 318).

As to the *Horn Silver* case, Mr. Justice White says in his concurring opinion (216 U. S. 56, 71), that it "involved no question of interstate commerce, but the right of a foreign corporation to carry on in a State a manufacturing business without compliance with the laws of the State."

Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181.

In this case no question of interstate commerce was involved. The Pennsylvania statute there upheld prohibited any foreign corporation from having an office in that State "for the use of its officers, stockholders, agents or employés," unless it should first obtain a license and pay a license fee annually of "one-fourth of a mill on each dollar of capital stock which said company is authorized to have." The company was organized under the laws of Colorado "for the purpose of carrying on a general mining and milling

business in that State." Its principal office was in Colorado. It had an office in Pennsylvania "for the use of its officers, stockholders, agents and employés." Upon the facts stated there was nothing to indicate that the company attempted to do any interstate business in Pennsylvania. It merely maintained an office there. Whether it there sold any of its products for delivery outside of that State, or there superintended interstate sales or deliveries, did not appear. Whether it was engaged in interstate commerce anywhere is not shown. The difference between this case and the Baltic case consists in the fact that the Baltic Company, through its selling agent, was engaged in interstate commerce, consisting of sales of copper made in New York for delivery in other States, including Massachusetts, throughout the country and in foreign countries. Its Boston office was maintained for its general management, which, of course, includes the superintendence and management of its whole business, including its interstate sales and deliveries, which constituted about ninety-five per cent. of its total sales. The only object of the office of the Pembina Company in Pennsylvania appears from the fact stated that it was maintained "for the use of its officers, stockholders, agents and employés." The Court, in sustaining the statute, did not consider that any question of interstate commerce was involved.

Mr. Justice Field there says (p. 189):—

> "The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, *provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce.*"

The inapplicability of the *Pembina* case to cases where interstate commerce is involved is pointed out in *McCall* v. *California* (136 U. S. 104), where the Court says (p. 112):—

> "This Court held [in that case] that the State legislation in question did not infringe upon the commercial clause of the Constitution, because it imposed no prohibition upon the transportation into the State of the products of the corporation or upon their sale in the State, but simply exacted a license tax from the corporation for its office in the Commonwealth."

There was nothing whatever to indicate that the Pennsylvania office was in any way used for purposes of interstate commerce.

Norfolk & Western R.R. Co. *v.* **Pennsylvania, 136 U. S. 114.**

If the *Pembina* case (*supra*) means anything more than above stated, it is directly in conflict with the *Norfolk and Western* case, and must be regarded as overruled by the later case. Here the same Pennsylvania statute was involved. The statute was held unconstitutional, as applied to a foreign railroad corporation which maintained such an office in Pennsylvania. The company had no main or branch lines within Pennsylvania, but by virtue of connections with other railroads and traffic contract, had become a link in a through line of road over which, as a part of the business thereof, freight and passengers were carried into and out of Pennsylvania.

Mr. Justice Lamar there says (p. 120):—

> "What was the purpose of the company in establishing an office in the city of Philadelphia? Manifestly for the furtherance of its business interests in the matter of its commercial relations . . . That office was maintained because of the necessities of the interstate business of the company, and for no other purpose. A tax upon it was, therefore, a tax upon one of the *means* or *instrumentalities* of the company's *interstate commerce;* and as such was in violation of the commercial clause of the Constitution of the United States."

Manifestly, the office of the Baltic Company, maintained for the "general financial management, and direction of the Company's affairs" (Baltic, Rec. 7, 8), comes within this principle. It was maintained for the furtherance and management of its entire business, *including its interstate sales* made through its selling agent.

IV.

Interstate Commerce.

Sales of goods or contracts for their sale made in one State, for delivery in another State, or requiring transportation through more than one State, constitute transactions of interstate commerce, notwithstanding the fact that the transportation is conducted, not by the seller, but by common carriers.

The S. S. White Company was clearly engaged in interstate commerce. At and through its Boston place of business, sales and contracts of sale requiring transportation and delivery from one State into other States and deliveries thereunder were either negotiated, managed, or superintended. The Baltic Company was clearly engaged in interstate commerce, all sales made by the United Metals Selling Company, "as its agent," being made by the principal itself. The "larger part" of the sales of its copper were consummated in New York, such sales being there made for delivery in and throughout the several States of the United States, including Massachusetts, and in foreign countries (Baltic, Rec. 8).

A tax upon the seller of goods is a tax upon the goods themselves.

Brown v. *Maryland*, 12 Wheat. 419.
Welton v. *Missouri*, 91 U. S. 275.
Kehrer v. *Stewart*, 197 U. S. 60, 65.

"A tax upon goods sold in another State, delivered to a common carrier and consigned to the purchaser in the State of Georgia, was an illegal interference with interstate commerce."

Kehrer v. *Stewart*, 197 U. S. 60, 65.
Caldwell v. *North Carolina*, 187 U. S. 622.
Norfolk, etc., Ry. Co. v. *Sims*, 191 U. S. 441.

It would seem wholly unnecessary to argue or cite cases in support of the propositions that sales or contracts for the sale of goods made or negotiated in one State for delivery in another State, or requiring transportation to the purchaser in another State, are transactions of interstate commerce; that the goods so sold are subjects of such commerce; that the business of selling them involves such commerce; that the place of business where such sales or deliveries thereunder are made, managed, or superintended, is one of the means or instrumentalities of such commerce; and that the company making such sales is engaged in interstate commerce.

But it is strenuously argued, in behalf of the Commonwealth, that the sales made by the plaintiff in error do not involve interstate commerce, because it is not itself engaged in the transportation of the goods, which is conducted by common carriers, and because, further, as is claimed, the title to goods sold in Massachusetts and there delivered to common carriers for transportation to purchasers in other States, passes to the purchaser within the limits of Massachusetts, and that consequently these companies are engaged wholly in domestic commerce.

If this were true as to the deliveries to common carriers in Massachusetts, it would apply with equal force in the S. S. White case to sales made in Massachusetts requiring delivery from the Pennsylvania factory. In such case the title would pass in Pennsylvania upon delivery to the carrier there, and the goods would then be transported from that

State to the purchasers in Massachusetts and other New England States.

Reference to the statement of facts (*supra*) shows that the S. S. White Company was engaged in at least six distinct kinds of interstate commerce.

The facts in the Baltic case are also clear. There it appears that the "larger part" of the sales, apparently amounting to about ninety-five per cent. of the total sales, was made in New York, such sales being there made "in considerable quantities for delivery to purchasers and consumers residing in Massachusetts, as well as for delivery in other States" (Baltic, Rec. 8). Purely local sales made in Massachusetts for delivery therein "do not exceed five (5) per cent. of the total sales made by the Company for transportation and delivery of its copper outside of the State of Michigan," the place where the mine and smelter are located (*ibid.*). "The delivery of the copper to the purchaser is effected by transporting the same from the Michigan Smelter to the purchaser at his place of business in Massachusetts, or elsewhere, as the case may be" (*ibid.*).

All the sales in the Baltic case were made by the United Metals Selling Company which the Baltic Company "employs *as its agent*" for the purpose of selling its copper, under an exclusive agency (Baltic, Rec. 8).

In the S. S. White and Baltic cases the decision was rested upon the assumption that the facts showed that the company's business at its Boston office was partly interstate and partly domestic.

The Court says in the S. S. White case (212 Mass. p. 35):—

> "We have not discussed the point much relied upon by the Commonwealth that a close analysis of the facts shows that a large percentage of the petitioner's business conducted in Boston is intrastate, and only a very small fraction interstate, for we reach our decision assuming that the proportions asserted by the petitioner in this regard are correct" (S. S. White, Rec. 25).

The exact facts are of no consequence here. The only questions raised by the assignments of error relied on are whether certain rulings of law should have been given, pursuant to requests for rulings, based on the fact that the company was, to some substantial extent, engaged in interstate commerce, and maintained its Boston place of business partly for interstate commerce and partly for domestic business.

It seems to be contended in behalf of the Commonwealth that ordinary trading and manufacturing corporations, which sell goods in one State for delivery in other States, are not engaged in interstate commerce, and that only transportation companies or common carriers, or the like, are so engaged.

This contention, if made, contradicts the original conception of "commerce."

The sale and barter of goods for delivery in other States have, from the outset, been regarded as transactions of interstate commerce.

Transportation of goods and passengers is a later development. Many decisions of this Court were required before "interstate commerce" was extended in its meaning so as to cover railroads, steamships, telegraph and telephone companies.

In the leading case of *Gibbons* v. *Ogden* (9 Wheat. 1, 189) Chief Justice Marshall says:—

> "The subject to be regulated is commerce. . . . The counsel for the appellee would limit it to traffic, to *buying* and *selling*, or the interchange of *commodities*, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: It is intercourse."

See also *Brown* v. *Maryland*, 12 Wheat. 419, 446.

"It [commerce] means trade, and it means intercourse."

Mr. Justice Miller in *Henderson* v. *Mayor*, 92 U. S. 259, 270.

United States v. *Holliday*, 3 Wall. 407, 417.

"Commerce with foreign countries and among the States, strictly considered, consists in intercourse and *traffic*, including in these terms navigation and the transportation and transit of persons and property, as well as the *purchase, sale* and exchange of *commodities*."

Mr. Justice Field, in *County of Mobile* v. *Kimball*, 102 U. S. 691, 702.

Lottery case, 188 U. S. 321, 352, 353.

Pomeroy Constitutional Law, Sec. 378.

McCall v. *California*, 136 U. S. 104, 108.

"The *negotiation* of *sales* of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

Mr. Justice Bradley in *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497.

Transportation by a common carrier is by no means the test of interstate commerce.

Such commerce may exist without the intervention of any form of transportation.

Thus passage by persons on foot across the bridge between Covington, Kentucky, and Cincinnati, Ohio, is interstate commerce.

Covington Bridge Co. v. *Kentucky*, 154 U. S. 204, 218.

So also is the passage of a herd of sheep, where the sheep are driven on foot at a reasonable rate of speed from a point

in Utah across Wyoming to a point in Nebraska, whence they are ultimately to be shipped by rail.

Kelley v. *Rhoads*, 188 U. S. 1.

Cattle in transit are subjects of interstate commerce, when intended for sale upon their arrival at the stock-yards, even though no sale or agreement for sale has been made in advance of their arrival.

Swift & Co. v. *United States*, 196 U. S. 375.

So also the floating of logs on a river from one State to another while in transit constitutes interstate commerce.

Diamond Match Company v. *Ontonagon*, 188 U. S. 82.
Brown v. *Houston*, 114 U. S. 622.
Coe v. *Errol*, 116 U. S. 517.
The Daniel Ball, 10 Wall. 557.

Intercourse or communication between persons in different States by means of correspondence schools, which use the mails for that purpose, is also interstate commerce.

International Text Book Co. v. *Pigg*, 217 U. S. 91.

These decisions sufficiently establish that interstate commerce may exist wholly independent of any transportation and without the intervention of common carriers.

Transportation is the usual incident to interstate commerce, but is not an indispensable prerequisite. Railroads are instrumentalities or means of carrying on interstate commerce. The attempt is here made to convert a mere incident, railroad transportation, into the very essence of the idea of "interstate commerce."

V.

THE PROTECTION OF THE "COMMERCE" CLAUSE IS NOT LIMITED TO *quasi*-PUBLIC CORPORATIONS. THE NEGOTIATION OF SALES BY ORDINARY TRADING CORPORATIONS ENGAGED IN INTERSTATE COMMERCE COMES WITHIN THE PROTECTION OF THE "COMMERCE" CLAUSE, AS AGAINST STATE STATUTES IMPOSING EXCISES, WHETHER IN THE FORM OF OCCUPATION OR PRIVILEGE TAXES, OR OF LICENSE FEES.

The Court below held that the principles of the Western Union and Pullman decisions apply only to *quasi*-public corporations, and that ordinary trading, manufacturing, or mining companies engaged in interstate sales of goods do not come within the protection of the "commerce" clause against excises of this description.

We submit that no case can be cited which supports these views. The contrary has long since been settled with regard to occupation and privilege taxes, license fees, and other forms of excises imposed upon ordinary trading companies and their agents engaged in negotiating interstate sales of goods. Many cases prior to the Western Union and Pullman decisions had fully decided that interstate sales of goods, the companies and agents making them, their business and the place where the business is conducted, are all protected by the "commerce" clause against State excises, and that the protection of that clause is not limited, in its application, to railroads, common carriers, or other *quasi*-public corporations conducting transportation or similar business "for hire."

In *Robbins* v. *Shelby Taxing District* (120 U. S. 489) the Tennessee statute was held to be in conflict with the "commerce" clause when applied to a citizen of Ohio who had negotiated sales of goods by sample in Tennessee, as agent or "drummer" for the seller, a firm doing business in Ohio, without payment of the Tennessee license or privilege tax

imposed upon the occupation of "drummers" and upon all persons not having a regular licensed house of business in the taxing district and offering for sale or selling therein, by sample, goods or merchandise.

In *Corson* v. *Maryland* (120 U. S. 502) the Maryland statute was held unconstitutional which provided that "no person or corporation other than the grower, maker or manufacturer shall barter or sell or otherwise dispose of or shall offer for sale any goods, chattels, wares or merchandise within the State, without first obtaining a license." A license tax was there exacted, varying from $15 to $150 according to the amount of merchandise kept on hand by the seller at its principal selling season.

In *Welton* v. *State of Missouri* (91 U. S. 275) a license or privilege tax imposed by Missouri upon all dealers or pedlers who there sold sewing-machines manufactured outside of the State was held to be in conflict with the "commerce" clause.

In *Brown* v. *Maryland* (12 Wheat. 419) it had previously been held that the Maryland statute was unconstitutional which required importers of foreign goods to pay a State license tax before they were allowed to sell them in Maryland in the original form and condition in which they were imported, the Court holding that the tax, though in form an occupation tax, was, in effect, a tax upon the goods imported.

In *Asher* v. *Texas* (128 U. S. 129) a Texas statute levying an occupation tax upon commercial travellers selling goods, by sample or otherwise, was held to be in conflict with the "commerce" clause when applied to "drummers" selling or soliciting sales of goods to be brought from some other State into Texas.

In *Walling* v. *Michigan* (116 U. S. 446) the Michigan tax was held unconstitutional which imposed a tax upon nonresidents there engaged in the business of selling or soliciting the sale of liquors to be shipped into Michigan from

places outside of its limits, while not imposing a similar tax upon the sale of liquors manufactured within the State.

In *Brennan* v. *Titusville* (153 U. S. 289) a Pennsylvania town ordinance, under statutory authority, was held unconstitutional, which required payment of license fees by all persons "canvassing or soliciting within said city orders for goods, books, paintings, wares or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited." The canvasser solicited orders in Pennsylvania for pictures and picture frames, in behalf of his principal, a manufacturer in Illinois. The orders for the goods were forwarded to Illinois, and the goods were shipped from that State to the Pennsylvania purchasers by railroad and express, the price of the goods being collected from the purchaser in some cases by the express company and in other cases by the seller's Pennsylvania agent.

In *Stockard* v. *Morgan*, 185 U. S. 27, the Tennessee privilege tax was held to be unconstitutional which was levied on the occupation of merchandise brokers residing in Tennessee and doing business therein, when applied to brokers whose sole business consisted in the solicitation of orders for the purchase of goods to be shipped into the State, even though such brokers acted for several non-resident principals. The brokers solicited the orders from jobbers or wholesale dealers in Tennessee. The orders were then submitted to their principals, having been taken subject to their acceptance or rejection.

After full examination of the authorities Mr. Justice Peckham thus sums up the results (p. 34):—

> "These cases exhibit different phases of the same general principle, but all follow that principle, as announced in the Robbins case, and deny the right of the State to tax people representing the owners of property outside of the State, for the privilege of soliciting orders within it as agents of such owners for property to be shipped to persons within the State."

In *Caldwell* v. *North Carolina* (187 U. S. 622) a North Carolina city ordinance was held unconstitutional, when applied to orders for goods obtained in the State by agents of a foreign corporation, the ordinance requiring payment of a license tax by "every person engaged in the business of selling or delivering picture frames, pictures, photographs or likenesses of the human face in the city of Greensboro, whether an order for the same shall have been previously taken or not." Such orders and sales were held to constitute interstate commerce, where it appeared that a portrait company in another State obtained such orders through its agents in North Carolina. The orders were filled by shipping the pictures and frames in separate packages to the agents for convenience in packing and handling. The agents placed the pictures in their proper frames and delivered them to the purchasers.

In *Norfolk & Western Railway* v. *Sims* (191 U. S. 441) it was directly held that sales and agreements for sale, made in one State and contemplating delivery in another, constitute interstate commerce, irrespective of the manner of delivery and the exact place where title technically passes. It was accordingly held that the North Carolina statute was unconstitutional which imposed a license tax upon "every manufacturer of sewing machines and every person or persons or corporation engaged in the business of selling the same in this State," when applied to sales of sewing machines manufactured in one State and shipped by rail or express, C. O. D., to a person in another State, pursuant to an order given by mail.

In *Rearick* v. *Pennsylvania* (203 U. S. 507) an ordinance of a Pennsylvania town was held to be unconstitutional which exacted a license fee for the solicitation of orders for the sale or delivery at retail, either on the streets or by travelling from house to house, of foreign or domestic goods not of the person's own manufacture or production, when applied to groceries thus sold by an Ohio corporation to

purchasers in Pennsylvania, pursuant to orders obtained through its soliciting agents in Pennsylvania. The goods were forwarded by rail to the company's agent in Pennsylvania in distinct packages marked with the names of each purchaser. He then delivered them to the purchasers, upon payment of the agreed price, subject to the right of the purchaser to reject them, if not equal to the samples shown when the order was given.

In *Dozier* v. *Alabama* (218 U. S. 124) the Alabama statute was held to be unconstitutional which imposed a license tax upon persons, not having a permanent place of business in the State, who solicited orders for the enlargement of photographs or for pictures of any kind, or for picture frames, whether they charged for the frames or not, when applied to orders for portraits solicited and received by a Chicago seller through its agents in Alabama. The orders were for portraits of the kind wanted, specifying the price payable upon delivery and giving the purchaser the option to buy and accept an appropriate frame, in which all portraits were to be delivered, at factory prices, which were stated to be one-third to one-half of the usual retail prices. The picture, together with the frame, was sent to the company's agent in Alabama and remained the property of the company until paid for upon delivery by the agent.

Mr. Justice Holmes there says (pp. 127, 128):—

> "No doubt it is true that the customer was not bound to take the frame unless he saw fit, and that the *sale* of it took place *wholly within the State* of Alabama, if a sale was made. But, as was hinted in *Rearick* v. *Pennsylvania* (203 U. S. 507, 512), what is commerce among the States is a question depending upon broader considerations than the existence of a technically binding contract, or the time and *place where the title passed.*"

Under the principles of the above cases it is settled that sales of goods for delivery in other States constitute trans-

actions of interstate commerce; that the protection of the "commerce" clause is not confined to *quasi*-public corporations, but is extended equally to trading, manufacturing and mining companies engaged in interstate sales; and that excises, whether in the form of privilege and occupation taxes or of license fees, are unconstitutional, when exacted for the privilege of making, negotiating or superintending interstate sales or contracts of sale or deliveries thereunder, even though the order is given and title passes within the limits of the taxing State.

Various other excises or license fees have been held unconstitutional, where exacted for the privilege of maintaining an office within the State used for purposes of interstate commerce.

In *McCall* v. *California* (136 U. S. 104) the San Francisco Municipal License Tax, assessing upon "every railroad agency twenty-five dollars per quarter," was held to be repugnant to the "commerce" clause, where applied to a railroad agent who maintained his place of business in San Francisco and there solicited passenger traffic, as the agent for a railroad operating between Chicago and New York, but having no railroad lines in California. The agent sold no tickets. His only duty was to induce people contemplating a trip East to book from Chicago to New York over the line he represented.

In its opinion the Court directly answers the proposition stated in the Baltic opinion (207 Mass. 387, 388, 389; Baltic, Rec. 16) to the effect that the Massachusetts office was not essential to its interstate commerce and might readily be given up without injury or affecting its interstate business. The Court there says (p. 111):—

> "The reply to this proposition is, that the *essentiality* of the business of the plaintiff in error to the commerce of the road he represented is not the test as to whether that business was a part of interstate commerce. It may readily be admitted, without prejudicing his de-

> fence, that the road would continue to carry passengers between Chicago and New York, even if the agent had been prohibited altogether from pursuing his business in California. The test is—Was this business a part of the commerce of the road? Did it assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent."

The Baltic office in Boston was maintained for the "general financial *management* and *direction* of the Company's affairs," besides other uses (Baltic, Rec. 7, 8). This included the general management and direction of its entire business, both interstate and domestic. As its interstate sales constituted approximately ninety-five per cent. of its total sales, the general management and direction of the company's affairs included supervision over interstate commerce to this extent. Its place of business in Massachusetts was, therefore, maintained, in part, for the purposes of its interstate commerce. This is the test, according to Mr. Justice Lamar.

It is immaterial that the company might equally well manage and direct its interstate business by removing its office to some other State.

In *Norfolk & Western Railway Co.* v. *Pennsylvania* (136 U. S. 114) a similar decision was made, covering an office where interstate business was transacted.

Apart from the above decisions as to privilege or occupation taxes, license fees and taxes for the privilege of maintaining offices, another class of cases shows still more clearly that sales of goods for delivery in other States constitute transactions of interstate commerce, and that the protection of the "commerce" clause is extended to ordinary trading corporations engaged in interstate sales, as well as to transportation or other *quasi*-public corporations.

In *Cooper Manufacturing Company* v. *Ferguson* (113 U. S. 727) it was held that a contract entered into in Colorado between an Ohio corporation and citizens of Colorado, whereby the corporation sold or agreed to sell a steam engine and other machinery, to be manufactured by it in Ohio, and to be shipped from Ohio, consigned to the purchasers, constituted a transaction of interstate commerce and was protected by the "commerce" clause against the foreign corporation statute of Colorado which provided that foreign corporations before engaging in business in that State must obtain a certificate.

Justices Matthews and Blatchford there say (p. 736, 737):

> "*That* [contract] *was commerce;* and to prohibit it, except upon conditions, is to regulate commerce between Colorado and Ohio, which is within the exclusive province of Congress. It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicile in that State, and to prohibit it from carrying on within that State its business of *manufacturing* machinery. But it cannot prohibit it from *selling* in Colorado, by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce among the States."

In *Parsons-Willis Lumber Co.* v. *Stuart* (182 Fed. 779) the Circuit Court of Appeals for the Fifth Circuit held that a contract made in Kentucky by a Kentucky corporation, for the purchase of lumber from an Alabama corporation, to be sawed and delivered for shipment on the cars in Alabama, constitutes interstate commerce. The Alabama statute requiring foreign corporations to procure permission before doing business was there regarded as unconstitutional, so far as it affected interstate sales, though the precise point decided was that this contract, being a single transaction, did not in itself amount to carrying on business within the meaning of the statute. The Court there said (pp. 781, 782):—

"The principle that the right of a foreign corporation to engage in business within a State other than that of its creation, depends solely upon the will of such other State, has been long settled.

"Among the exceptions to this rule is, where the business of the foreign corporation constitutes interstate commerce, and is, therefore, solely within the paramount authority of Congress.

"A foreign corporation has the right to *sell* articles of commerce anywhere in Alabama, and to ship them to the purchasers, and any attempt to interfere with such business would be an interference with interstate commerce. The converse of the proposition must also be true, namely, that a foreign corporation may *buy* or make a contract with a citizen of Alabama to *buy*, articles of commerce—subjects of trade and barter offered in the market."

See also *United States* v. *Standard Sanitary Mfg. Co.*, 191 Fed. 172.

Ordinary trading foreign corporations, engaged in interstate commerce, may enter a State for the purposes of such commerce or continue to transact their business therein without complying with foreign corporation statutes requiring the filing of annual statements of financial condition and the like. The protection of the "commerce" clause, in such cases, is clearly not confined to *quasi*-public corporations.

International Text Book Co. v. *Pigg*, 217 U. S. 91.

International Text Book Co. v. *Lynch*, 218 U. S. 664.

Buck Stove & Range Co. v. *Vickers* (decided December 2, 1912).

Indeed, the Massachusetts Court admits that, under certain conditions, sales of goods for delivery in other States constitute transactions of interstate commerce and that

the protection of the "commerce" clause covers trading companies as well as transportation and *quasi*-public corporations.

The Massachusetts Court holds that this very excise is void, as applied to ordinary trading companies, where they are engaged exclusively in interstate commerce. In such cases they come within the protection of the "commerce" clause.

Attorney-General v. *Electric Storage Battery Company*, 188 Mass. 239.

Baltic Mining Co. v. *Commonwealth*, 207 Mass. 381.

VI.

THE MASSACHUSETTS EXCISE IS UNCONSTITUTIONAL AND VOID, BECAUSE IT IS ALSO REPUGNANT TO THE "EQUAL PROTECTION OF THE LAWS" CLAUSE.

Whatever power a State may have to determine the terms of admission of foreign corporations not already within its borders, it cannot subject a foreign corporation which is already in the State in compliance with its laws, and has there acquired property of a fixed and permanent nature, to a new or additional excise for the privilege of doing business which is not at the same time imposed upon domestic corporations. Such an excise is unconstitutional and void, because it constitutes a denial of the "equal protection of the laws" under the Fourteenth Amendment.

Southern Ry. Co. v. *Greene*, 216 U. S. 400.

The Massachusetts excise is unconstitutional and void under the principles established in that case.

In *Southern Ry. Co.* v. *Greene* (supra) the Alabama statute was held to be unconstitutional for this reason, which imposed a new and increased tax upon foreign corporations

for the privilege of doing domestic business within the State. The railroad company, prior to the passage of the new tax law, had been duly admitted to do business in Alabama, and had there constructed lines of railroad and expended large sums of money in the improvement thereof, pursuant to the pre-existing tax laws. The new tax was not made applicable to domestic corporations owning similar property and carrying on the same kind of business.

Mr. Justice Day there says (p. 412):—

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation." . . .
>
> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. . . . It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the State, and other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the State, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws" (pp. 417, 418).

This decision is equally applicable to the Massachusetts excise. The S. S. White Company had been duly admitted

to do business in Massachusetts and had paid the foreign corporation tax prescribed by the earlier law (Sts. 1903, C. 437, Sec. 75), amounting to "one-hundredth of one per cent. of the par value of its authorized capital." Under the earlier law it was allowed to deduct from its excise "the amount of taxes upon property paid by it to any city or town in the Commonwealth during the preceding year." The Company for at least ten years has maintained a place of business in Boston, after having been duly admitted to do business in this State, occupying leased premises, where it has made permanent investments, by way of trade and tenant's fixtures there installed. Having paid this rate for a number of years, in 1907 (Sts. 1907, C. 578, now Sec. 56 of Sts. 1909, C. 490, Part III), the rate of taxation was doubled. By the same statute the previously existing right to deduct local property taxes was eliminated, thereby affecting all corporations, like the S. S. White Company, having merchandise, fixtures, and other property subject to local taxation (Sts. 1903, C. 437, Sec. 71).

No similar change was made at the same time with reference to the domestic corporations having the same kind of property and engaged in the same line of business. The taxation of domestic corporations is under the provisions of Sts. 1909, C. 490, Part III, Sec. 41, 43.

By these statutes (see Statement of Facts, *supra*) it will be seen that domestic corporations are allowed to deduct local property taxes from the amount of their excise or franchise tax. Foreign corporations engaged in the same line of business are not allowed to make such deductions. Furthermore, there is an arbitrary classification among foreign corporations resulting from the maximum limit. The smaller corporations pay a much higher rate than the larger companies. The Massachusetts tax is, accordingly, unconstitutional because in conflict with the "equal protection of the laws" clause.

VII.

THE FACT THAT THIS EXCISE HAS A MAXIMUM LIMIT CANNOT HELP ITS CONSTITUTIONALITY, ESPECIALLY WHERE THE MAXIMUM IS NOT APPLICABLE TO THE COMPANY BEFORE THE COURT.

The Court below, in attempting to differentiate the Massachusetts statute from the Kansas excise condemned in the Western Union and Pullman cases, pointed out that the Massachusetts excise is limited to a maximum of $2,000 per annum. The fact that there is such a maximum can have no material bearing as applied to the plaintiff in error, inasmuch as it is not subject to it.

It is difficult to see how the fact that the larger corporations are subject to the maximum provision and, accordingly, pay a tax relatively much less than the smaller corporations like the plaintiff in error, can help the constitutionality of this statute, when applied to a company not affected by the maximum rate.

The plaintiff in error is assessed at the rate of one-fiftieth of one per cent. per annum. At the same rate a ten-million-dollar corporation would pay $2,000, the exact amount of the maximum. A hundred-million-dollar company would likewise pay the maximum, which in its case would represent an assessment at the rate of one 500th of one per cent. on its capital. In other words, the plaintiff in error pays at a rate ten times as high as the hundred-million-dollar company. The inequality and the injustice thus arising out of an arbitrary maximum of this kind would not seem to help the argument in favor of the constitutionality of the statute. The question whether the tax is unduly high, in view of the maximum, presents an immaterial issue. The amount or reasonableness of the tax might be a proper subject for discussion if a flat rate of $2,000 for each com-

pany had been exacted for the privilege, but such questions are immaterial here.

The objection to this excise is that, because it is based on the entire capital, representing both interstate and domestic business and property, the *measure* adopted makes the tax unconstitutional.

The leading contentions of the plaintiffs in error may be summed up as follows:—

(1) The Massachusetts excise is, in all material respects, like the Kansas excise condemned as unconstitutional in the Western Union and Pullman decisions.

(2) These decisions are controlling here.

(3) They apply to all interstate commerce corporations, including trading, mining and other companies. They are not limited in their scope to *quasi*-public corporations.

(4) Nor are they limited to companies having a fixed permanent investment in domestic commerce which is so inextricably intertwined with that used in interstate commerce that it could not be abandoned without serious injury to the latter.

(5) The real objection to the Kansas statute was that it adopted an unconstitutional measure.

(6) This measure, being based on the entire authorized capital of the company, by its necessary effect burdened directly and substantially the business and property necessarily represented by the capital, including its interstate commerce and property.

(7) It was well established law prior to these decisions that a statute which has the necessary effect of burdening interstate commerce is unconstitutional, though professedly exacted for the privilege of transacting domestic business.

(8) These decisions determine conclusively that excises based on the entire capital have the necessary effect and operation of directly and substantially burdening interstate commerce, even though, in form, imposed as a con-

dition of granting the privilege of transacting domestic commerce.

An unconstitutional condition of this character is the equivalent of a direct burden upon interstate commerce.

(9) That the maximum provision in the Massachusetts statute does not help its constitutionality, especially where the companies before the Court are not affected by the maximum limit.

(10) The Western Union and Pullman decisions conclusively determine that an excise based on the entire capital of an interstate commerce corporation, like the Kansas and Massachusetts taxes, in its necessary operation and effect taxes property represented by that capital, and accordingly taxes property located beyond the borders of the taxing State. It, therefore, takes away property unlawfully in violation of the "due process" clause.

(11) The distinctions attempted by the Court below have no bearing upon the "due process" clause. The Massachusetts excise is void under this clause, irrespective of the "commerce" clause.

(12) The Massachusetts statute is also unconstitutional, under the principles of *Southern Railway* v. *Greene* (*supra*), because it is repugnant to the "equal protection of the laws" clause.

We submit, therefore, that the Massachusetts Court erred in upholding the constitutionality of the Massachusetts excise on foreign corporations, and further erred in the particular respects set forth in the Specification of Errors relied on (*supra*), and that, accordingly, the decree of the Supreme Judicial Court of Massachusetts should be reversed.

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[redacted]

[redacted]

No. 20

[redacted]

COMMONWEALTH OF MASSACHUSETTS

vs.

No. 863

[redacted]

COMMONWEALTH OF MASSACHUSETTS

[redacted]

BRIEF FOR DEFENDANTS IN ERROR

[redacted]

JAMES M. SWIFT

[redacted]

ANDREW MARSHALL

Supreme Court of the United States

OCTOBER TERM, 1912

No. 268

BALTIC MINING COMPANY
PLAINTIFF IN ERROR

v.

COMMONWEALTH OF MASSACHUSETTS

No. 800

S. S. WHITE DENTAL MANUFACTURING COMPANY
PLAINTIFF IN ERROR

v.

COMMONWEALTH OF MASSACHUSETTS

In Error to the Supreme Judicial Court of Massachusetts

BRIEF FOR DEFENDANT IN ERROR

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Supreme Court of the United States.

October Term, 1912.

No. 268.

BALTIC MINING COMPANY, *Plaintiff in Error,*

v.

COMMONWEALTH OF MASSACHUSETTS.

No. 800.

S. S. WHITE DENTAL MANUFACTURING COMPANY, *Plaintiff in Error,*

v.

COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The defendant in error is unable to acquiesce in many of the argumentative statements appearing in the Statement of the Case made by the plaintiffs in error, and especially in the description of the Kansas tax which was held unconstitutional by this court in

the cases of Western Union Company and Pullman Company *v.* Kansas, 216 U. S. 1, 56, as an "excise of precisely the same character" as the excise to be considered in this case. Without specifically controverting each statement which it considers inaccurate or misleading, the defendant in error therefore submits the following Statement of the Case.

These cases originated as petitions in the Supreme Judicial Court of Massachusetts to recover under St. 1909, c. 490, Part III., § 70, a provision of law providing for the recovery of excises unlawfully exacted from corporations by the Commonwealth, an excise paid by the first plaintiff in error in 1910, amounting to $500, and an excise paid by the second plaintiff in error in 1911, amounting to $200.

They were heard upon the petition, answer, and statements of agreed facts.

The cases raise the question whether the law of Massachusetts imposing these excises, judged by its actual operation and effect as applied to the plaintiffs in error, is, as contended by the plaintiffs in error, unconstitutional on the following grounds: —

1. That it imposes an unlawful burden on interstate commerce.

2. That it takes property without due process of law.

3. That it violates the requirement for equal protection of the law.

The Massachusetts court dismissed the petitions and refused to make the rulings requested by the plaintiffs in error.

Under the Constitution of Massachusetts, taxes are of two kinds, — property taxes and excises. The first

must be proportional. The second need only be reasonable. The taxes imposed by the Commonwealth of Massachusetts upon both domestic and foreign business corporations doing business and having a place of business in Massachusetts have been invariably intended by the Legislature, and defined by the courts, as excise taxes imposed on the commodity or privilege of transacting business within the Commonwealth, and having an establishment for business within the Commonwealth, with the protection of its laws and the financial and other advantages of a situation within the Commonwealth; and not as taxes on property.

The provisions of law under which the excises in question in the cases at bar were imposed upon the plaintiffs in error are the provisions relating to taxation in what is designated in the law itself as "The Business Corporation Law", St. 1903, c. 437. Speaking generally, this law includes within its provisions domestic and foreign corporations engaged in ordinary mercantile and manufacturing business and in construction work, but excludes from its provisions telegraph, railroad, express and public service and transportation companies of all kinds, and banking, trust, surety and indemnity companies.

Distinct provision for taxation of these excluded corporations is made by the laws of Massachusetts, and the question whether the law under consideration in the cases at bar would be constitutional if applied to telegraph and railroad and other similar corporations does not arise in this case and cannot arise under the Massachusetts system of taxation.

The provision of The Business Corporation Law, under which the excises in question were imposed, was

originally St. 1903, c. 437, § 75. It was amended by St. 1907, c. 538, and appears in that amended form in the codification of the laws of Massachusetts relating to taxation, as St. 1909, c. 490, Part III., § 56, and provides as follows: —

"Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

This provision of law, ever since its original enactment, has been applied to foreign corporations engaged in mining, mercantile and manufacturing business and maintaining a place of business within Massachusetts for the uses of intra-state business alone or of both intra-state and interstate business.

This provision of law has never been considered as applicable to foreign corporations engaged solely in interstate commerce, and has been declared by the courts of the Commonwealth not to be applicable to corporations engaged solely in interstate commerce and having a place of business in the Commonwealth used solely for the purposes of interstate commerce.

It has also been held by the courts of the Commonwealth that this provision of law would not be applicable to a foreign corporation for which no special provision is made in the statutes of the Commonwealth if it should be engaged in the work of conducting some kind of interstate commerce for hire, as its principal function, and at the same time should be engaged

in intra-state business so closely connected with the interstate commerce that it could not be given up without serious detriment to the interstate commerce; so that its condition in that respect would be like that of the Western Union Telegraph Company, as represented in the case of Western Union Telegraph Co. *v.* Kansas, *supra*.

An injunction issued against the doing of business by a corporation subject to this provision of law, which is engaged in both interstate and intra-state business, for the purpose of enforcing compliance with the corporation laws of Massachusetts, is directed only against the intra-state business, and has been held by the courts of the Commonwealth to be limited in its effect to the intra-state portion of the corporation's business.

Both plaintiffs in error for several years complied with these provisions of law in all respects, and paid without protest excises imposed upon them under the same provisions of law and measured in the same manner as the excises under consideration in the cases at bar, until, stimulated by what the defendant in error submits is a misunderstanding of the decisions of this court in the cases of Western Union Telegraph Company and Pullman Company *v.* Kansas, they brought the petitions in these cases, alleging that as applied to them the provisions of law in question are unconstitutional.

The plaintiff in error, the Baltic Mining Company, is a corporation organized under the laws of Michigan for the purpose of mining, reducing and smelting copper, with an authorized capital stock of $2,500,000.

Its mine and plant are situated in Michigan, and it is actually engaged in the business of mining and reducing copper at its mine. No copper is sold directly by the plaintiff in error itself. (Baltic Record, p. 8.) Its copper, after being mined, reduced, smelted and refined in Michigan, is marketed and sold exclusively through a selling agency, which is a distinct corporation, the United Metals Selling Company, incorporated under the laws of New Jersey. The copper is sold by the United Metals Selling Company for delivery to purchasers and consumers residing in Massachusetts and other states, delivery being effected by transportation by railroads and other common carriers, from the smelter in Michigan directly to the purchasers in Massachusetts or elsewhere. The United Metals Selling Company has no place of business in Massachusetts. A small percentage of the sales is consummated in Massachusetts by that company, — not more than 5 per cent. of the total, — and a large percentage in New York.

The Baltic Mining Company maintains, and for several years has maintained, a usual place of business in Massachusetts, consisting of an office in the city of Boston for the use of its president and treasurer, and for the general financial management and direction of the company's affairs, for meetings of its board of directors, and for transfer of its stock. (Baltic Record, pp. 7, 8.)

The plaintiff in error the S. S. White Dental Manufacturing Company is a corporation established under the laws of Pennsylvania, having its statutory principal place of business at Philadelphia. It has an authorized

capital stock of $1,000,000, and is engaged in the business of manufacturing and selling artificial teeth and dental instruments and apparatus and supplies of every description, and of buying and selling products of a similar description of other manufacturers and dealers.

It does not manufacture goods within the Commonwealth of Massachusetts, but it sells goods manufactured by itself and manufactured by others within the Commonwealth of Massachusetts, and it maintains, and has for many years maintained, a usual place of business within the city of Boston, in Massachusetts, consisting of a large store or salesroom, with offices and storerooms adjoining. At its store it keeps a large stock of goods on hand and displays its goods in showcases, on counters, floors and shelves, and from its stock on hand sells both at wholesale and retail, both over the counter and for subsequent delivery, its own manufactures and the manufactures of others to buyers residing within, and to buyers residing outside of, Massachusetts; but in either case the offer is received and accepted and the sale is made in Massachusetts. (White Record, p. 11.)

At its Boston place of business it employs 54 persons, 12 of whom travel through New England and the Maritime Provinces. The orders received by these travelling salesmen are sent to the Boston store for acceptance and the sale is made at the Boston office, the goods being sometimes shipped from the Boston store to purchasers and sometimes from its Pennsylvania or New York factory. Except in cases of local delivery over the counter or by messenger, it does not deliver its goods to its customers and receives no profit from the transportation performed by express com-

panies, railroads or other carriers. (White Record, pp. 11, 12.)

The provisions of the statutes of Massachusetts providing for the payment, collection and recovery of excises upon corporations in the position of the plaintiffs in error, so far as they are material to the decision of these cases, are as follows: —

St. 1909, c. 490, Part III., § 39.

"The term 'domestic business corporation' as used in this act shall mean every corporation of the classes enumerated in section one of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three; the term 'foreign corporation' shall mean every corporation, association or organization of the classes enumerated in section fifty-eight of said chapter."

[*St. 1903, c. 437, § 58.*

"Every such foreign corporation (that is, every corporation established under laws other than those of the commonwealth, having a capital stock and established for the purpose of carrying on business for profit, but excluding the telegraph, railroad and other companies not included by the statute, and others covered by distinct provisions; see §§ 56, 7, 1) which has a usual place of business in this commonwealth, or which is engaged in this commonwealth, permanently or temporarily, and with or without a usual place of business therein, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind, shall, before doing business in this commonwealth, in writing appoint the commissioner of corporations and his successor in office to be its true and lawful attorney upon whom all lawful processes in any action or proceeding against it may be served, and in such writing shall agree that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served on it, and that the

authority shall continue in force so long as any liability remains outstanding against it in this commonwealth. The power of attorney and a copy of the vote authorizing its execution, duly certified and authenticated, shall, upon payment of the fee hereinafter provided, be filed in the office of the commissioner, and copies certified by him shall be sufficient evidence thereof. Service of such process shall be made by leaving a copy of the process and a fee of two dollars in the hands or in the office of the commissioner, and such service shall be sufficient service upon the corporation."]

St. 1909, c. 490, Part III., §§ 54, 55, 56, 58 and 70.

"SECTION 54. Every foreign corporation shall annually, within thirty days after the date fixed for its annual meeting, or within thirty days after the final adjournment of said meeting, but not more than three months after the date so fixed for said meeting, prepare and file in the office of the secretary of the commonwealth, upon payment of the fee provided in section ninety-one of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, a certificate signed and sworn to by its president, treasurer, and by a majority of its board of directors, showing the amount of its authorized capital stock, and its assets and liabilities as of a date not more than ninety days prior to said annual meeting, in such form as is required of domestic business corporations under the provisions of section forty-five of said chapter, and the change or changes, if any, in the other particulars included in the certificate required by section sixty of said chapter, made since the filing of said certificate or of the last annual report.

SECTION 55. A certificate which is required to be filed by the preceding section shall be accompanied by a written statement under oath by an auditor, as provided in section forty-seven of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, except that such auditor shall in all cases be chosen by the board of directors. Before it is filed it

shall be submitted to the commissioner of corporations, who shall examine said certificate and shall as tax commissioner assess upon the corporation an excise tax in accordance with the provisions of the following section. If he finds that the certificate is in compliance with the requirements of the preceding section, he shall indorse his approval thereon; but no certificate shall be filed until he has indorsed his approval thereon, and until the excise tax required by the following section has been paid to the treasurer and receiver-general.

SECTION 56. Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars.

. . . . . .

SECTION 58. If a domestic business corporation fails to file its tax return before the tenth day of May of each year, or if a foreign corporation omits to file the certificate as required in section fifty-four, the tax commissioner shall give notice by mail, postage prepaid, to the corporation of its default, directed, in the case of a foreign corporation, to the resident manager, if any in the United States, or to any other person designated by the corporation, by written notice filed in the office of the commissioner, as provided in section fifty-nine of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three for notice of the service of legal process, which notice to said foreign corporation shall contain a copy of this section and of sections sixty-five to sixty-eight inclusive of said chapter. If such business or foreign corporation fails to file such return or certificate within thirty days after such notice of default has been given or mailed, it shall forfeit to the commonwealth not less than five nor more than ten dollars for each day for fifteen days after the

expiration of the said thirty days, and not less than ten nor more than two hundred dollars for each day thereafter during which such default continues, or any other sum, not greater than the maximum penalty or forfeiture, which the court may deem just and equitable, which, in the case of a foreign corporation, shall be recovered as herein provided.

Penalties and forfeitures incurred by any domestic business or foreign corporation which, being subject to the provisions of this act, omits to cause any certificate or return which may be required by the provisions of sections forty and fifty-four to be duly filed may be recovered in an action brought in the county of Suffolk in the name of the commonwealth, or they may be recovered by an information in equity in the name of the attorney-general at the relation of the tax commissioner, brought in the supreme judicial court in the county of Suffolk. Upon such information, the court may issue an injunction restraining the further prosecution of the business of the corporation named therein until such penalties or forfeitures, with interest and costs, have been paid, and until the returns and certificates required by this act have been filed.

. . . . . .

Section 70. Any corporation or association aggrieved by the exaction of said tax or excise or of any portion thereof may, within six months after the payment of the same, whether such payment be after or before the issue of the warrant mentioned in the preceding section, apply by petition to the supreme judicial court, setting forth the amount of the tax or excise and costs thereon so paid, the general legal grounds and the specific grounds in fact, if any, upon which it is claimed such tax or excise should not have been exacted. Said petition shall be the exclusive remedy and shall be entered and heard in the county of Suffolk. A copy of the same shall be served upon the treasurer and receiver general and upon the attorney-general. The proceedings upon such petition shall conform, as nearly as may be, to proceedings in equity, and an abatement shall be made of only such portion of

the tax or excise as was assessed without authority of law. In case said tax or excise has heretofore been exacted or is hereafter exacted in consequence of any law or statute of any other state of the United States, then the application above provided for may be made at any time within six years after the exaction of said tax or excise or any portion thereof."

BRIEF OF ARGUMENT.

I.

THE QUESTION.

What it is not.

The plaintiffs in error are not telegraph companies, railroad companies, Pullman car companies or companies of a similar nature. One is a mining company and the other is a mercantile and manufacturing company. The taxes in question were not imposed under the law and constitution of Kansas, or of Arkansas or of Colorado. The law of Massachusetts under which the taxes were imposed is not, as stated in the brief of the plaintiffs in error, "in terms applicable to all foreign corporations." The taxes imposed were not taxes on property or "charter fees."

In spite of the theory upon which the plaintiffs in error have presented their argument, the question raised by these cases is not whether a provision of law taken out of a system of taxation founded and built upon peculiar provisions of the Constitution of Massachusetts and imposing a certain kind of a tax upon a certain kind of a corporation engaged in mining, mercantile or manufacturing business carried on in a certain way, would be constitutional if grafted upon

the taxation systems of the States of Kansas, or Arkansas, or Colorado, or any other State, and applied to the taxation of a telegraph company or a Pullman car company, or to any other kind of a corporation which under the Massachusetts system is excluded from its application and to which it was never intended to be applied.

What it is.

The real question is whether the provision of law under which these excises were imposed upon the plaintiffs in error, considered with reference to the provisions of the Constitution of Massachusetts, and with reference to the history, theory and administration of the taxation system of Massachusetts, and with reference to the decisions of the courts of Massachusetts and of this court, is, in its actual operation and effect, unconstitutional as applied to these particular plaintiffs in error, transacting their business as the pleadings and agreed facts, not arguments and inferences, show that they transacted that business.

The validity of the statute in question as applied to "interstate commerce corporations" cannot arise in Massachusetts and the plaintiffs in error may challenge the validity of the act only as the act applies to themselves.

Lawpasas *v.* Bell, 180 U. S. 276, 284.

II.

THE EXACTIONS IN QUESTION ARE TO BE JUDGED AS EXCISES AND NOT AS PROPERTY TAXES.

The plaintiffs in error, on page 27 of their brief, admit in the following terms that the taxes in question were excises and not property taxes, —

> "Both the Kansas and the Massachusetts taxes are admittedly excises, and not property taxes in any sense.
>
> "The Massachusetts Court in the S. S. White case (212 Mass. p. 35) proved at great length the uncontroverted proposition that the Massachusetts tax is an excise, and not a property tax, — a conclusion which has always been and still is fully admitted by the plaintiff in error."

The defendant in error is, however, skeptical as to the wholeheartedness of this admission that the taxes in question "were excises and not property taxes in any sense," since the contention that they are taxes upon the entire capital, representing all the property of the plaintiffs in error, wherever situated, is inconsistent with this admission, and since their entire argument fails to give to these excises the attributes which properly belong to excises. The plaintiffs in error either do not "fully admit" that these excises are in fact excises, in the sense in which the word is used in the taxation system of Massachusetts, and the decisions of the court of Massachusetts and of this court or they misconceive the bearing which the nature of the tax has upon the constitutional questions raised.

Before proceeding to the discussion in detail of the constitutional questions, therefore, the defendant in error begs leave to call attention to certain points

in the history of the excise tax imposed by Massachusetts corporations, which history is thoroughly discussed in the opinion of the Massachusetts court in the S. S. White case.

(*a*) *The history of the taxes shows them to be excise taxes.*

In the taxation system of the Commonwealth of Massachusetts, based directly upon the provisions of its Constitution, property taxes and excise taxes are perfectly distinct, and the distinction has been clearly recognized and marked in the legislation of the Commonwealth, and has been defined both by the courts of the Commonwealth and by this court. It is thus expressed by the Massachusetts court in the opinion in the S. S. White Company case: —

"Under our Constitution, which has been the organic law of this Commonwealth since 1780, taxes are of two kinds, property taxes and excises. The first of these must be both proportional and reasonable; the latter need not be proportional, but only reasonable."

In the year 1815 the case of Portland Bank *v.* Apthorp, 12 Mass. 252, was argued. An excise of one per cent per annum upon the capital of all banks had been imposed by the Legislature, and in that case the court, speaking through Chief Justice Parker, said: —

"Those taxes (that is, those upon property) must be proportional upon all the inhabitants of, and persons resident and estates lying within, the Commonwealth. The exercise of this power requires an estimate or valuation of all the property in the Common-

wealth; and then an assessment upon each individual, according to his proportion of that property. To select any individual or company, or any specific article of property, and assess them by themselves, would be a violation of this provision of the Constitution. But there are other sources of emolument and profit, not strictly called property, but which are rather to be considered as the means of acquiring property, from which a reasonable revenue may be exacted by the Legislature . . . . The exercise of this power is called the imposing or levying of duties and excises."

It has been held over and over again since 1780, when the Constitution of the Commonwealth was adopted, that any property tax, to be valid under the Constitution, must be proportional, and any such tax assessed upon certain property at a rate different from that on other property is disproportional.

Oliver *v.* Washington Mills, 11 Allen, 268, 275.
Cheshire *v.* County Commissioners, 118 Mass. 386, 389.
Northampton *v.* County Commissioners, 145 Mass. 108, 109.
Opinion of the Justices, 195 Mass. 607.
Opinion of the Justices, 208 Mass. 616.
S. S. White Dental Manufacturing Co. *v.* Commonwealth, 212 Mass. 35, 38.

It has never been held that excises need be more than reasonable.

The provision of the Constitution of Massachusetts giving to the Legislature the broad power of levying excises which need not be proportional but only reasonable, is found in chapter I, section I, article IV, and provides as follows: —

"And further, full power and authority are hereby given and granted to the said general court, from time to time . . . to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same; . . ."

The word "commodity" is of broad signification and includes the privilege of transacting business as a corporation, whether domestic or foreign, within this Commonwealth. In the case of Commonwealth *v.* Lancaster Savings Bank, 123 Mass. 493, 495, the court, in discussing this provision of the Constitution, said: —

"'Commodity' is a general term, and includes the privilege and convenience of transacting a particular business; and, upon persons carrying on such business, it has never been questioned that the Legislature may levy an excise, or provide that a license must be obtained in order to transact it. See Gen. Sts., c. 50. And, when a number of persons are incorporated by the Legislature for a special purpose, or, being incorporated by another state, have an office or place of business within the Commonwealth, upon the franchise thus conferred or exercised, an excise may be laid."

Attorney-General *v.* Bay State Mining Co., 99 Mass. 148.

Attorney-General *v.* Electric Storage Battery Co., 188 Mass. 239.

Farr Alpaca Co. *v.* Com'th, 212 Mass. 162.

The policy of the Commonwealth of Massachusetts relative to the taxation of corporations, both domestic and foreign, is built upon this distinction between a

property tax and an excise tax. It was established in 1862 as to savings banks, and in 1864 as to business corporations. The excise upon the commodity of exercising the business of a savings bank was based upon the amount of its deposits, and the excise upon the commodity of being a business corporation was based upon the market value of its capital stock after deducting its real estate and machinery, if any, taxed locally. The constitutionality of these acts was assailed, but the excises were sustained as valid, on the ground that they were not property taxes.

> Commonwealth *v.* People's Five Cents Savings Bank, 5 Allen, 428.
>
> Commonwealth *v.* Provident Institution for Savings, 12 Allen, 312.
>
> Commonwealth *v.* Hamilton Manfg. Co., 12 Allen, 298.

In the last two cases it was contended that since each corporation had a substantial part of its assets invested in bonds of the United States, which were exempt from taxation under the Constitution of the United States, an excise was unconstitutional which was based, in the case of the bank, upon the amount of deposits, a large part of which was invested in United States bonds; and in the case of the manufacturing corporation upon the market value of its shares, which derived a material and ascertainable part of their value from the ownership of United States bonds. On this point both cases were taken to the Supreme Court of the United States.

> Provident Institution *v.* Massachusetts, 6 Wall. 611.
>
> Hamilton Co. *v.* Massachusetts, 6 Wall. 632.

In the latter case the court said, at pages 639, 640: —

"Separated from the peculiar provision of the State Constitution, and the long practice under the original decision (Portland Bank *v.* Apthorp, 12 Mass. 252) the present decision of the State court upon the subject might well be criticised as founded in unsubstantial distinction but when weighed as an exposition of that peculiar clause and in view of the long practice of the State, commencing long before the prior decision was made, it is not possible to withhold from the conclusion a full and unqualified concurrence. . . . Property taxation and excise taxation, as authorized in the Constitution of the State, are perfectly distinct, and the two systems are easily distinguished from each other, if we adopt the definition of the word 'commodities' as uniformly given by the courts of the State, and as universally understood by the taxpayers and assessors."

The policy of imposing excises upon corporations has been applied gradually but consistently by the Legislature to an increasing number of kinds of corporations. It has applied it to telegraph and telephone companies, whether foreign or domestic, operating lines partly within and partly without the State, and these excises, though differing in the mode of ascertainment from those imposed upon ordinary manufacturing and mercantile corporations, have been upheld.

Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 536.

Massachusetts *v.* Western Union Telegraph Co., 141 U. S. 40.

Similar statutes imposing excises of the same nature, under still different modes of ascertainment, have been enacted with reference to railroad, street railway and

express companies. St. 1909, c. 490, Part III. §§ 40, 41, 43, 52, 72 and 76, contain these provisions as now codified. The same principle has been applied to foreign insurance companies.

> Oliver *v.* The Liverpool & London Life & Fire Ins. Co. 100 Mass. 531.
>
> Connecticut Mutual Life Ins. Co. *v.* Commonwealth, 133 Mass. 161.

The principle of imposing an excise upon the privilege of doing business within this State through a foreign mining, quarrying or oil corporation, based upon a percentage of the par value of its capital stock, was established by St. 1865, c. 283, § 8, which provided as follows: —

> "Every corporation chartered by this Commonwealth or organized under the general laws, for the purpose of engaging, without the limits of the Commonwealth, in the business of coal mining or other mining, quarrying or extracting carbonaceous oils from the earth, or for the purpose of purchasing, selling or holding mines or lands without the Commonwealth; and every such company or association, incorporated elsewhere, and having an office or place of business within the Commonwealth for the direction of its affairs or transfer of shares, shall, semi-annually, between the first and the tenth day of June and December, make a return, under the oath of its treasurer, or president, to the tax commissioner, of the whole amount of its capital stock, as fixed by the corporation, on the first day respectively of May and November next preceding, and pay to the treasurer of the Commonwealth a tax of one-twentieth of one per cent. upon said capital stock at the par thereof."

The constitutionality of this act was assailed, but it was held a valid excise under both the State and Federal

Constitutions, in Attorney-General *v.* Bay State Mining Co., 99 Mass. 148, where the court said, at page 153: —

"But it is not merely the franchise of incorporation that is the basis of a tax; nor is it the capital, regarded merely as property. . . .

. . . A corporation which seeks, by its agents, to establish a domicil of business in a state other than that of its creation, must take that domicil, as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there."

The language of section 56, the provision under which the taxes in the cases at bar were imposed, when considered in the light of this history, shows conclusively that the Legislature intended the payments under discussion to be excise taxes. With reference to this point the Massachusetts court, in its opinion in the S. S. White case, at page 40, said: —

"Thus it appears that for nearly one hundred years this court has sustained as constitutional excises upon corporations which could not have been upheld as property taxes under the terms of our Constitution. The conclusion is irresistible that the Legislature intended the financial burden now under discussion to be an excise. It is expressly declared by the terms of the statute to be an excise. The declared purpose of the act is to be accepted as true, unless incompatible with its meaning and effect. Hazen *v.* Essex Co., 12 Cush. 475, 477. Flint *v.* Stone Tracy Co., 220 U. S. 107, 145."

(*b*) *The statute itself describes the tax as an excise tax.*

In the light of the history of taxation legislation in Massachusetts nothing could be clearer than that the Legislature, in describing the tax in section 56 as an

excise tax, intended it to be an excise tax of the same nature as the excise taxes which had been imposed under authority of the Constitution, and with the sanction of the State and Federal courts throughout the history of Massachusetts taxation. Section 56 provides, — "Every foreign corporation shall . . . pay . . . *an excise tax*." This language of the Legislature, while the defendant in error does not contend that it is conclusive unless in operation and effect it proves to be what it purports to be, is, nevertheless, significant, and is to be given due weight.

Flint *v.* Stone Tracy Co., 220 U. S. 107, 145.

In that case the Federal corporation tax law required corporations "to pay annually a special excise tax." The constitutionality of the law was attacked, on the ground, among several grounds, that the tax was measured by the entire income of the parties subject to it, notwithstanding a part of such income was derived from non-taxable property. At page 145 the court said: —

"While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, nevertheless the declaration of the law-making power is entitled to much weight, and in this statute the intention is expressly declared to impose a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company. It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or

insurance business and with respect to the carrying on thereof, in a sum equivalent to one per centum upon the entire net income over and above $5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described."

(c) *The taxes under discussion have been defined by the Supreme Court of Massachusetts as excise taxes and not taxes on property.*

Not only has the Legislature declared the payments in question to be excise taxes, but the highest court of the Commonwealth has also declared them to be excise taxes. In the case of the first plaintiff in error, Baltic Mining Company *v.* Commonwealth, 207 Mass. 388 (Baltic Record, p. 16), the Massachusetts court said: —

"The required payment is strictly of an excise tax, and not of a tax upon property. . . . This excise is for the commodity or privilege of having an establishment for business in Massachusetts, with the protection of our laws and the financial and other advantages of a situation here."

Pratt *v.* Street Commissioners, 139 Mass. 559, 561, 562.

Commonwealth *v.* Barnstable Savings Bank, 126 Mass. 526.

Suffolk Savings Bank, petitioner, 151 Mass. 103, 106.

Attorney-General *v.* Massachusetts Pipe Line Gas Co., 179 Mass. 15, 19.

Greenfield Savings Bank *v.* Commonwealth, 211 Mass. 207.

Farr Alpaca Co. *v.* Comm., 212 Mass. 156, 162.

In the case of the second plaintiff in error, the S. S. White Dental Manufacturing Company, 212 Mass. 35, at page 41 (White Record, p. 22), the Massachusetts court said: —

"This tax then must be regarded in the light of our taxation history and system as intended by the Legislature and interpreted by the courts as a pure excise tax. Upon no other ground could it be sustained under our own Constitution. In no sense can it be regarded under our jurisprudence as a property tax."

(d) The construction and interpretation given by the Massachusetts court to the provision of law under which the taxes in question were imposed are conclusive upon this court, if in actual operation and effect the statute is consistent with that construction and interpretation.

Brown-Forman Co. *v.* Kentucky, 217 U. S. 563, 572.

In that case it was said by this court: —

"Such a construction and interpretation of the statute here involved, by the highest court of the State, should be accepted as definitely determining that the tax complained of is not a property tax, but a license tax imposed upon the doing of a particular business plainly subject to the regulating power of the State."

Stockard *v.* Morgan, 185 U. S. 27, 30.

In that case this court said: —

"In this case we are bound to give the same meaning to the state statute that was given to it by the Supreme Court of the State, and the question which remains for us to decide is, whether

as so construed the statute violates any provision of the Federal Constitution."

Osborne *v.* Florida, 164 U. S. 650, 654.

In that case appears the following language: —

"The particular construction to be given to this state statute is a question for the state court to deal with, and in such a case as this we follow the construction given by the state court to the statutes of its own State."

Hamilton Co. *v.* Massachusetts, 6 Wall. 632.

In that case the court, in discussing the very question whether a tax was a property tax or an excise, but regarding it as an excise upon a commodity, said: —

"Such was the construction given to the term by the Supreme Court of the State more than fifty years before the present controversy arose, and the rule is well settled in this court that the construction of the constitution or statute of a State by the highest judicial tribunal of such State, in a case not involving any question under the twenty-fifth section of the Judiciary Act, is to be regarded as a part of the provision, and that it is as binding upon the courts of the United States as the text."

(e) *The distinction between an excise tax and a property tax as imposed under the Constitution of Massachusetts and the Constitution of the United States is not fanciful but real, and has long been recognized and is still recognized by this court.*

Enough has been said to show that the distinction between an excise tax and a property tax has been recognized by the Legislature and courts of Massa-

chusetts throughout the constitutional history of the Commonwealth, and that the distinction is given full recognition at the present day.

This distinction has also been recognized by this court during the same period, and is given recognition at the present day.

Hamilton Co. *v.* Massachusetts, 6 Wall. 632.

In that case the court said, at page 640, the language already quoted: —

"Property taxation and excise taxation, as authorized in the constitution of the State, are perfectly distinct, and the two systems are easily distinguished from each other, if we adopt the definition of the term 'commodities' as uniformly given by the courts of the State, and as universally understood by the taxpayers and assessors."

Flint *v.* Stone Tracy Co., 220 U. S. 107.

In that case a law under discussion was the Federal act known as the "Corporation Tax" law, which provided for the annual payment of "a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year. . . ." In that case, as already stated, it was contended that the act was unconstitutional in that it reached property which was not subject to taxation. At page 150, in the opinion, appears this language: —

"The act now under consideration does not impose direct taxation upon property solely because of its ownership, but the tax is within the class which Congress is authorized to lay and collect under Art. I, § 8, cl. 1 of the Constitution, and described generally as taxes, duties, imposts and excises, upon which the limitation is that they shall be uniform throughout the United States.

Within the category of indirect taxation, as we shall have further occasion to show, is embraced a tax upon business done in a corporate capacity, which is the subject-matter of the tax imposed in the act under consideration. The *Pollock Case* construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the acts is not merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way.

. . . . . .

(Page 152.) If we are correct in holding that this is an excise tax, there is nothing in the Constitution requiring such taxes to be apportioned according to population."

(f) The nature of the exaction is not altered by the method adopted for its ascertainment, but rather is confirmed by it.

The position of the plaintiffs in error would seem to be that although they admit that the taxes in question are excise taxes, and in no sense property taxes, nevertheless, on account of the fact that they are measured by reference to the par value of the amount of authorized capital stock, not to exceed, however, $2,000, the taxes are, in spite of the admission to the contrary, taxes upon the property of the corporations situated in

States other than Massachusetts, for the reason that the capital stock of the corporation represents the entire property of the corporation wherever situated.

Such an argument does away with the distinction between an excise tax and a property tax, and thoroughly confuses the two classes of taxation. The taxes under discussion, having been imposed as excise taxes, being classed by the Legislature under authority of the Constitution as excise taxes, and being regarded both by the highest court of Massachusetts and by this court as different in nature and distinct from property taxes, and even being admitted by the plaintiffs in error in the early portion of their argument to be wholly distinct from property taxes, must be so regarded to the end of the argument, and must be given the attributes and prerogatives of excises.

The manner of the ascertainment of the amount of the exaction cannot, as if by magic, transform what is in fact an excise tax into a property tax, under the circumstances of these cases. In the case of the first plaintiff in error, the Baltic Mining Company, 207 Mass. at page 388 (Baltic Record, p. 16), the Massachusetts court said: —

"The required payment is strictly of an excise tax, and not of a tax upon property. *The fact that it is estimated upon the par value of the capital stock*, with a maximum limit of $2,000 as the highest tax that can be imposed upon the largest corporation, *does not make it a tax upon property.*"

Attorney-General *v.* Bay State Mining Co., 99 Mass. 148.

Commonwealth *v.* Lancaster Savings Bank, 123 Mass. 493.

Pratt *v.* Street Commissioners, 139 Mass. 559, 562.

Provident Institution *v.* Massachusetts, 6 Wall. 632.

Hamilton Co. *v.* Massachusetts, 6 Wall. 632.

Society for Savings *v.* Coite, 6 Wall. 594, 608.

Flint *v.* Stone Tracy Co., 220 U. S. 107.

Since the tax is in its nature an excise tax, authorized by the Constitution of Massachusetts, the Legislature has wide discretion as to the method to be prescribed for computing the amount of the tax.

Delaware Railroad Tax, 18 Wall. 206, 231.

In that case the State levied a tax upon the railroad of ¼ of 1 per cent. upon its capital stock of $400,000, and the tax was attacked upon the ground that it was a regulation of interstate commerce and that it was a tax upon property beyond the jurisdiction of the State. The court pointed out that the tax was not imposed upon the shares of capital stock nor upon the property of the corporation, and in sustaining the tax said, at page 231: —

"The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

The Legislature in imposing this tax upon the privilege of maintaining a business establishment in Massachusetts has chosen to use the amount of the authorized capital stock as set forth in the corporation's annual certificate of condition to obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied for that privilege.

It is to be noted that the amount is 1/50 of 1 per cent. of the *par value of the authorized capital stock* and not 1/50 of 1 per cent. of the *actual value of the shares* of the corporation's capital stock. The authorized capital stock of the Baltic Mining Company is $2,500,000. The assets of the company are not less than $10,776,000. (Baltic Record, p. 7.) The authorized capital stock of the S. S. White Company is $1,000,000. Its surplus alone is $4,324,363.55. (White Record, p. 12.) These facts show that the measure of the tax is not an attempt to get at the property which the capital stock actually represents.

It is to be noted, also, that the tax is not absolutely measured by 1/50 of 1 per cent. of even the par value of the authorized capital stock, but is limited to a maximum of $2,000 upon even the largest corporation.

The amount of the authorized capital stock is used simply as a guide to a fair grading of taxes between that maximum of $2,000 and the minimum. No hardship or unfairness is apparent in such a method. And even if there were, it would be a matter for the consideration of the State Legislature and not of this court, in the absence of any constitutional objection.

Home Silver Mining Co. *v.* New York, 143 U. S. 305.

Provident Institution *v.* Massachusetts, 6 Wall. at p. 627.

In that case an excise tax measured by a certain percentage of the average deposits was levied, and as part of the deposits were invested in United States bonds and so were tax exempt, the tax was attacked as taxing property which the State had no right to tax. But the court sustained the tax by showing that it was not a property tax, saying, —

"Reference to the average amount of the deposits is made not as descriptive of the subject to be assessed but as furnishing the basis of computing the amount of the tax to be paid by the corporation. The subject matter to be taxed is the corporation and the average amount of the deposits within the period named furnishes the basis of computing the amount."

Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181.

In that case a Colorado mining and milling corporation having an office in Philadelphia was subjected to *an office license tax of one-quarter of a mill upon each dollar of its capital stock.* Its constitutionality was attacked on several grounds and among them that it taxed property outside the jurisdiction. The court sustained the tax, saying, —

"No tax upon the franchise of the foreign corporation is levied, nor upon its business or property without the State. A license tax only is exacted as a condition of its keeping an office within the State for the use of its officers," etc.

See also Maine *v.* Grand Trunk Rwy. Co., 142 U. S. 217.
Home Insurance Co. *v.* New York, 134 U. S. 594.
Flint *v.* Stone Tracy Co., 220 U. S. 107.

In its opinion in the S. S. White Company case, 212 Mass. at page 43, the Massachusetts court said: —

"The effect of our statute is to establish a maximum excise of $2,000 as a license for doing business in this State. It is a condition exacted annually as a prerequisite to conducting a local business here. It is the manner in which a fee is determined and levied for the gift of a function from the State, which it is at full liberty to deny or bestow. If the sovereignty confers the gift, it may fix its own conditions. This is in itself a reasonable sum. . . . The gauge of this reduction is not the value of the property of the corporation, nor the actual value of its shares, but the par value of its capital stock. This fact, in conjunction with the comparatively small maximum established, is another indication that the excise cannot be a property tax. Reference to the par value of the capital stock in such connection 'is made, not as descriptive of the subject to be assessed.' Provident Institution *v.* Massachusetts, 6 Wall. 611, 627."

It is submitted, therefore, that the Legislature has not gone beyond the limits of its discretion in adopting the method which it has adopted for computing the amount of the excise tax to be imposed, and that the amounts of the excises in these cases, $500 and $200 respectively, resulting from such computation show that these license fees are not in fact taxes on the millions in value of property of the plaintiffs in error merely masquerading as excises.

III.

THE MASSACHUSETTS STATUTE AS APPLIED TO THE PLAINTIFFS IN ERROR DOES NOT CONFLICT WITH THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

A.

A STATE MAY TAX A FOREIGN CORPORATION FOR THE PRIVILEGE OF A DOMICILE FOR LOCAL BUSINESS IF THE EFFECT IS NOT TO REGULATE INTERSTATE COMMERCE.

The plaintiffs in error contend that the Massachusetts statute is void because repugnant to the commerce clause of the Federal Constitution, and to support that contention they urge as general propositions, —

1. That a State cannot lawfully impose an excise measured by the entire capital stock of a foreign corporation engaged in interstate commerce as a condition of its right to transact domestic business.

2. That such a measure, in its necessary effect and operation, directly and substantially burdens interstate commerce, and therefore regulates it.

3. That the unconstitutionality of the Massachusetts excise under the commerce clause is conclusively settled by the principles established in the Western Union and Pullman cases, 216 U. S. 1, 56.

The defendant in error denies each of these allegations in the terms in which they are stated as applied to the cases at bar.

The Commonwealth of Massachusetts, acting under the provisions of its Constitution, may lawfully impose a

bona fide excise measured in the manner in which the exaction under discussion was measured, upon a foreign corporation engaged in interstate commerce, as a condition of its right to transact intrastate business and have an establishment for the transaction of that domestic business within the Commonwealth, provided only that in actual operation and effect the excise so imposed shall not so directly burden the interstate commerce of the corporation as to amount to a regulation of it.

In general, a State has power to exclude or condition the entrance of foreign corporations within its limits. This principle has been established by so many decisions that no discussion is called for, and a few of the decisions are cited in which it is established in its application to the cases at bar, for the purpose of indicating the course of the argument.

Bank of Augusta *v.* Earle, 13 Peters, 519.
Security Mutual Life Ins. Co. *v.* Prewitt, 202 U. S. 246, 249.
Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, and cases cited.
Osborne *v.* Florida, 164 U. S. 650, 655.
Horn Silver Mining Co. *v.* New York, 143 U. S. 305.
Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181.
Cooper Manfg. Co. *v.* Ferguson, 113 U. S. 727.
Hammond Packing Co. *v.* Arkansas, 212 U. S. 322, 343.

Full recognition is, however, given by the defendant in error to the principle that a State, in exercising its

general right to exclude or condition foreign corporations, may not restrict or regulate interstate commerce. The argument of the defendant in error gives full effect to the limitation which forbids imposing upon corporations engaged in interstate commerce conditions so directly affecting the interstate commerce as to amount to a restriction of that commerce or to a regulation of it, within the meaning of the Constitution of the United States.

Commonwealth *v.* Petranich, 183 Mass. 217, 219.

Attorney-General *v.* Electric Storage Battery Co., 188 Mass. 239, 240.

Pickard *v.* Pullman Southern Car Co., 117 U. S. 34.

Cooper Manfg. Co. *v.* Ferguson, 113 U. S. 727.

Leloup *v.* Port of Mobile, 127 U. S. 640.

Crutcher *v.* Kentucky, 141 U. S. 47.

Postal Telegraph Cable Co. *v.* Charleston, 153 U. S. 692.

Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, and cases cited.

Pullman Co. *v.* Kansas, 216 U. S. 56, and cases cited.

International Text Book Co. *v.* Pigg, 217 U. S. 91.

Horn Silver Mining Co. *v.* New York, 143 U. S. 305.

Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381 (Record, p. 13).

S. S. White Dental Manfg. Co. *v.* Commonwealth, 212 Mass. 35 (Record, p. 25).

Upon this point the defendant in error does not regard the principles which the plaintiffs in error refer to as "*the principles established in the Western Union and Pullman cases*", 216 U. S. 156, as differing from the principles which have been long established.

Subject to this limitation the Commonwealth of Massachusetts, therefore, had the right to impose an excise measured by one-fiftieth of one per cent. of the par value of the authorized capital stock, not to exceed $2,000, upon the privilege enjoyed by the plaintiffs in error of transacting business and having an establishment for business in Massachusetts.

If that excise, reasonable in its amount, as imposed upon the privileges enjoyed by the plaintiffs in error is in its actual operation and effect nothing but an excise tax; if it does not impose upon any interstate business in which the plaintiffs in error are directly engaged and upon the property employed in that business such a direct burden as to make what is denominated as an excise in reality a tax upon interstate commerce and a tax upon property, the mode of its measure, however arbitrary and capricious, is wholly immaterial in this court.

Delaware Railroad Tax, 18 Wall. 206, 231.

In that case the court said, with reference to a tax upon the railroad of ¼ of 1 per cent. upon its capital stock of $400,000, which was attacked upon the ground that it was a regulation of interstate commerce, and that it was a tax upon property beyond the jurisdiction of the State, —

"It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

B.

Whether the excise regulates interstate commerce is a practical question to be determined by analyzing its effect in operation.

The bare statement of the plaintiffs in error that the excise in question, merely through the mode of its measure, in its necessary effect and operation directly and substantially burdens interstate commerce, begs the question.

The question which is really the crux of these cases is whether in actual operation and effect the Massachusetts excise imposed upon the privileges enjoyed by these plaintiffs in error does so directly affect whatever portion of their business may be so transacted as to constitute interstate commerce, as to amount to a regulation of that interstate commerce. The statement of the plaintiffs in error, that such a measure, in its necessary effect and operation, directly and substantially burdens interstate commerce, evades the vital issue of the case.

The defendant in error is prepared to meet that issue. It has already analyzed the excise as to its actual nature. It submits that it should also be analyzed as to its actual effect.

Galveston, Harrisburg, etc., Ry. Co. *v.* Texas, 210 U. S. 217, 227.

In that case this court said: —

"Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

That statement of the court might be paraphrased by saying that the plaintiffs in error, by ascribing to the Massachusetts excise a certain effect or by comparing and classifying it with a "charter fee" imposed by a different State, with a different system of taxation, upon a different sort of an object, can not take away our duty to consider the nature and effect of the Massachusetts excise as applied to the privileges enjoyed by the plaintiffs in error in these particular cases.

That is the rule which is applied by this court in the following cases, which are the sole reliance of the plaintiffs in error in the cases at bar.

Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1.

Pullman Co. *v.* Kansas, 216 U. S. 56.

Ludwig *v.* Western Union Telegraph Co., 216 U. S. 146.

Western Union Telegraph Co. *v.* Andrews, 216 U. S. 165.

Atchison, Topeka & Santa Fe Ry. *v.* O'Connor, 223 U. S. 280.

This court sought by looking through form to substance to ascertain whether the impost, whatever the

guise under which it was levied, was in fact a direct tax upon interstate commerce. The court found that the statutes under consideration did, under the circumstance of those cases of telegraph, railroad, Pullman car and express companies, impose a direct burden upon the portion of the corporate capital engaged in interstate commerce, and were therefore void.

The defendant in error does not seek to evade the application of the same test to the excises under discussion in the cases at bar.

C.

IN DETERMINING THE QUESTION THE WHOLE SCHEME OF TAXATION OF MASSACHUSETTS MUST BE TAKEN INTO ACCOUNT.

It has been repeatedly said by this court that the question whether a law is repugnant to the commerce clause of the Constitution is a practical question.

Galveston, Harrisburg, etc., Ry. Co. *v.* Texas, 210 U. S. 217, 225.

"Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines."

In that same case, at page 227, it was said, with reference to the distinction between the right of the State to tax property and, by implication, of its right to levy an excise or license, and its incapacity to tax interstate business: —

"The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. . . . A practical line can be drawn *by taking the whole scheme of taxation into account.*"

It is essential to the determination of the cases at bar that the whole scheme of taxation of Massachusetts be taken into account, both with reference to the nature of the exaction under discussion, and with reference to the classes of corporations to which the law imposing this exaction is applied.

What is to be said under the first point, with reference to the nature of the tax, is well said in the opinion of the Massachusetts court in the S. S. White case (White Record, p. 25). The Massachusetts court, after making the above quotation from the case of Galveston, etc., Ry. *v.* Texas, said: —

"Our corporation tax system, in the light of its history, bears this test. It is a scheme of taxation which is founded wholly upon the proposition as its corner stone that it is not a property but an excise tax. This is its only support, and it falls utterly if this fails. As was said by Chief Justice Holmes, in Tremont & Suffolk Mills *v.* Lowell, 178 Mass. 469, at 471, 'The franchise tax is not a tax on the property of the corporation, and its validity sometimes has depended upon this consideration.' This system of taxation has grown up under the shelter of two express decisions in its support by the Supreme Court of the United States. Provident Institution *v.* Massachusetts, 6 Wall. 611, and Hamilton Co. *v.* Massachusetts, 6 Wall. 632. These have both been cited with approval in Flint *v.* Stone-Tracy Co., 220 U. S. 107, 164, 165, 167. It cannot be thought that there was any intent in the cases upon which the petitioner relies to overrule these cases or to destroy a system of taxation which so far as its federal aspects are concerned has been built upon faith in them. See the language of

Holmes, C.J., in Smith *v.* Mayor and Aldermen of Worcester, 182 Mass. 232, 233."

The careful consideration of the sort of corporations to which the application of the law under discussion is limited, is equally essential.

It is misleading and inaccurate to speak of the law under discussion in the cases at bar as applying to every foreign corporation except so far as the meaning has been narrowed by judicial construction. By express legislative enactment it has no application whatever to telegraph, telephone, railroad, street railway, express or any sort of transportation and public service companies. The legislation of the State now deals, and always has dealt, with such companies upon a different basis from that established with reference to ordinary business corporations.

> Baltic Mining Co. *v.* Commonwealth (Baltic Record, p. 14).
>
> S. S. White Dental Manfg. Co. *v.* Commonwealth (White Record, pp. 22, 23).

Some of these distinct provisions are to be found in St. 1909, c. 490, Part III., §§ 40, 41, 43, 52, 72 and 76, and St. 1912, c. 457.

The law under discussion (section 56 of the codified taxation laws, St. 1909, c. 490, Part III.) is the original St. 1903, c. 437, § 75, as amended by St. 1907, c. 538. St. 1903, c. 437, § 1, provides as follows: —

"This act may be cited as THE BUSINESS CORPORATION LAW. It shall, *except as herein otherwise provided*, apply

(*a*) To all corporations having a capital stock and established

for the purpose of carrying on business for profit heretofore or hereafter organized under general laws of the commonwealth.

(*b*) To all such corporations heretofore created under special laws of the commonwealth, except so far as its provisions are inconsistent with the provisions of any such special laws enacted before the eleventh day of March in the year eighteen hundred and thirty-one as are not subject to amendment, alteration or repeal by the general court.

(*c*) To all such corporations hereafter created under special laws of the commonwealth so far as its provisions are consistent with the provisions of said special laws.

It shall not apply to corporations organized under general or special laws of this commonwealth for the purpose of carrying on within the commonwealth the business of a bank, savings bank, cooperative bank, trust company, surety or indemnity company, safe deposit company, insurance company, railroad or street railway company, telegraph or telephone company, gas or electric light, heat or power company, canal, aqueduct or water company, cemetery or crematory company, or to any other corporations which now have or may hereafter have the right to take or condemn land or to exercise franchises in public ways granted by the commonwealth or by any county, city or town. But the provisions of this section shall not be construed to prohibit the organization of a corporation under the provisions of this act for the purpose of carrying on any lawful business outside of this commonwealth."

Section 7 of the same act provides: —

"Three or more persons may associate themselves by a written agreement of association with the intention of forming a corporation under general laws for any lawful purpose which is not excluded by the provisions of section one except to buy and sell real estate or to distil or manufacture intoxicating liquors."

Section 56 of the same 1903 act provides: —

"The term 'foreign corporation' as used in this act shall mean every corporation, association or organization which has been

established, organized or chartered under laws other than those of the commonwealth for purposes for which domestic corporations may be organized under the provisions of section seven."

Section 58 of the same act is quoted among the statutes at the end of the statement of the case.

From this reference to the statutes it will be seen that this Business Corporation Law, of which the provision under discussion in the cases at bar is a part, speaking generally, applies to mining, mercantile and manufacturing companies, and expressly excludes from its application such companies as all those which were parties to the cases upon which the plaintiffs in error completely rely.

Cases like the cases from which the plaintiffs in error argue that the exactions made by our law are unconstitutional could not arise under our system of taxation.

D.

The interpretation and construction of the provision of law in question by the highest court of Massachusetts must also be taken into account.

The exaction under discussion has repeatedly been declared by the Supreme Court of Massachusetts to be an excise imposed for the commodity or privilege of having an establishment for business in Massachusetts, with the protection of its laws and the financial and other advantages of a situation there.

Attorney-General *v.* Electric Storage Battery Co., 188 Mass. 239, 240.

Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381, 388 (Record, p. 16).

S. S. White Dental Manfg. Co. *v.* Commonwealth, 212 Mass. 35, 40 (Record, p. 22). Keystone Watch Case Co. *v.* Commonwealth, 212 Mass. 50, 51.

In Attorney-General *v.* Electric Storage Battery Co. the statute was declared not to be applicable to a place of business established and maintained solely for use in interstate commerce. It was there said (page 240): —

"If the statute before us applied to the maintenance of a place of business solely for the purpose of engaging in interstate commerce it would be unconstitutional. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196. Norfolk & Western Railroad *v.* Pennsylvania, 136 U. S. 114. Its language is broad enough to include every corporation which has a usual place of business in the Commonwealth, even though it is a common carrier engaged in interstate commerce, and has its place of business here as a necessary means of carrying on this commerce. But it is a rule of law that a statute which would be unconstitutional as applied to a certain class of cases, and is constitutional as applied to another class, may be held to have been intended to apply only to the latter class, if this seems in harmony with the general purpose of the Legislature."

"In accordance with the doctrine referred to in the cases above cited, we are of opinion that the Legislature cannot have intended to include in this statute corporations whose usual place of business is established and maintained solely for use in interstate commerce. With this construction of the law, it is plainly constitutional."

In that case it was ordered that the injunction against the corporation, provided for by the statute, forbidding the transaction of its business so long as it disobeyed the law, should except so much of its business as was

a part of interstate commerce; thus recognizing the fact that no corporation or individual could be prevented from engaging in interstate commerce within the Commonwealth.

"The statute was construed as contemplating only this kind of an injunction."

Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381, 384 (Baltic Record, p. 13).

It was also held in the latter case that the statute in question —

"would be inapplicable to a foreign corporation for the taxation of which there is no special provision in our statutes, if it should be engaged in the work of conducting some kind of interstate commerce for hire as its principal function, and at the same time should be engaged in intrastate business so closely connected with the interstate commerce that it could not be given up without serious detriment to the interstate commerce, so that its condition in this respect would be like that of the Western Union Telegraph Company." (Baltic Record, pp. 17, 18.)

This construction and interpretation of the statute, being in harmony with the provisions of the Federal Constitution and the decisions of this court, will, we assume, unless incompatible with the effect of the law in actual operation, be accepted as conclusive upon this court.

Stockard *v.* Morgan, 185 U. S. 27, 30.
Brown-Forman Co. *v.* Kentucky, 217 U. S. 563, 572.
Osborne *v.* Florida, 164 U. S. 650, 654.

E.

The principles "established by the Western Union and Pullman cases" must be actually applied to the facts of the cases at bar.

The "establishment of principles" by the Western Union and Pullman cases, 216 U. S. 1, 56, does not in itself determine whether the Massachusetts excise is constitutional or unconstitutional under the commerce clause. That question may be determined only by the application of those principles to the special facts of the cases in which the Massachusetts excise is under discussion.

The fallacy of assuming as a demonstrated fact that an excise measured by reference to the capital stock of an interstate commerce corporation necessarily burdens interstate commerce when that is in truth the very proposition to be established as a fact in any particular case has already been pointed out.

Another fundamental fallacy in the argument of the plaintiffs in error is in treating themselves as "interstate commerce corporations" within the meaning of that expression as it appeared to be used in the Western Union Telegraph, Pullman and other cases relied upon in the argument.

There is a well recognized distinction between "interstate commerce corporations," so called, and ordinary business corporations, whose business consists partly of interstate commerce. The Western Union Telegraph, Pullman and the railroad companies and the like are within the former class; the ordinary

mining, mercantile and manufacturing company is within the latter class.

The defendant in error does not argue that only telegraph, railroad, express and pullman car companies are within the class denominated by this court as "interstate commerce corporations." It is significant, however, that every one of the recent decisions of this court upon which the plaintiffs in error rely for support of their chief contentions are cases of corporations "directly engaged for hire in transportation of intelligence or commerce or persons between the states," as stated by the Massachusetts court in its opinion in the S. S. White Dental Company case. (White Record, p. 22.) Whether a corporation is to be considered as an interstate commerce corporation is a practical question. The nature of the business and principal functions of any corporation go far to show whether the corporation is to be considered as an interstate commerce corporation or merely as an ordinary corporation engaged to some extent in interstate commerce.

The principles to be applied to the case of an ordinary business corporation engaged to some extent in interstate commerce are not different from the principles which are to be applied to the case of a telegraph or railroad or Pullman company. The effect of the application of the same principles to both classes of corporations does, however, vary with the difference in the nature of the functions performed by the two classes of corporations, and it cannot be assumed that because those principles, as applied to one class of corporations, have a certain unconstitutional effect, they necessarily have the same unconstitutional effect, or, indeed, any

unconstitutional effect, when applied to corporations of a different class.

There is nothing original or new in this contention. It has long been recognized as sound by this court.

> New York State *v.* Roberts, 171 U. S. 658, 664, 665.

"When a corporation of one State, whose business is that of a common carrier, transacts part of that business in other States, difficult questions have arisen, and this court has been called upon to decide whether certain taxing laws of the respective States infringe upon the freedom of interstate commerce. It has been found difficult to prescribe a satisfactory rule whereby the public burdens of taxation can be justly apportioned between the business and agencies of such a corporation in different States, and the subject has been much discussed in several recent cases. Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530; Pittsburgh, Cincinnati, etc., Railway *v.* Backus, 154 U. S. 421; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18; Adams Express Co. *v.* Ohio, 165 U. S. 194. It is not necessary in this case to enter into a subject so difficult, but the cases are referred to as showing the distinction between corporations organized to carry on interstate commerce, and having a quasi-public character, and corporations organized to conduct strictly private business.

The corporation concerned in the present litigation is of the latter character, and the case comes within the doctrine of Paul *v.* Virginia, 8 Wall. 168, and of subsequent cases affirming that one. Horn Silver Mining Co. *v.* New York, 143 U. S. 305, may be specially mentioned, as it involved a similar question and the same statutes which are before us in the present case."

This point was also emphasized in the very case upon which the plaintiffs in error place most reliance.

> Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 33.

"It is true that in many cases the *general* rule has been laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people. But those were cases in which the particular foreign corporation before the court was engaged in ordinary business and not directly or regularly in interstate or foreign commerce."

S. S. White Dental Mfg. Co. *v.* Commonwealth, 212 Mass. 35, 43, and cases cited. (White Record, p. 23.)

The difference in the effect of the application of the same statute to one corporation engaged in interstate commerce as its principal function, and to another corporation engaged in interstate commerce only as incidental to its principal function of mining or manufacturing, could hardly be more clearly illustrated than by the two following cases, — Pembina Mining Company *v.* Pennsylvania, 125 U. S. 181; and Norfolk & Western R.R. *v.* Pennsylvania, 136 U. S. 114. Both of these cases attacked the constitutionality of section 16 of an act of Pennsylvania, approved June 7, 1879, entitled "An Act to provide Revenue by Taxation." The statute imposed an office license tax of one-fourth of a mill for each dollar of capital stock. It was contended in each case that the exaction of the fee regulated interstate commerce. In the case of the mining company the tax was sustained as valid, this court saying: —

"It is not perceived in what way the statute impinges on the commercial clause of the Federal Constitution. It imposes no prohibition upon the transportation into Pennsylvania of the

products of the corporation or upon their sale in the Commonwealth. It only exacts a license tax from the corporation when it has an office in the Commonwealth for the use of its officers, stockholders, agents or employees."

In the case of the railroad the tax was held unconstitutional as imposed upon the railroad, this court saying, at page 120: —

"Again, the plaintiff in error does not exercise or seek to exercise in Pennsylvania any privilege or franchise not immediately connected with interstate commerce and required for the purposes thereof. . . . That office is maintained because of the necessities of the interstate business of the company, and for no other purpose. A tax upon it was therefore a tax upon one of the means or instrumentalities of the company's interstate commerce, and as such was in violation of the commercial clause of the Constitution of the United States. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, etc."

F.

THE EXACTION IN QUESTION, CONSIDERED WITH REFERENCE TO THE WHOLE TAXATION SYSTEM OF MASSACHUSETTS AND AS CONSTRUED BY THE COURTS AND AS APPLIED TO THE FACTS IN THESE CASES DOES NOT AS A PRACTICAL MATTER REGULATE INTERSTATE COMMERCE IN WHICH EITHER PLAINTIFF IN ERROR IS ENGAGED.

The two cases are to be distinguished in their facts.

Although these cases are argued together as raising the same questions of law on account of the same assignment of errors made by the plaintiff in each case, nevertheless the cases are different in their facts

with reference to the business done at the Massachusetts places of business and the manner in which the business is conducted.

THE BALTIC MINING COMPANY IS NOT DIRECTLY ENGAGED IN INTERSTATE COMMERCE IN MASSACHUSETTS, AND ITS PLACE OF BUSINESS IN MASSACHUSETTS IS NOT MAINTAINED OR USED FOR THE PURPOSES OF INTERSTATE COMMERCE.

The principal business of the corporation is the mining, smelting and refining of copper. Its plant is in Michigan and its principal business is done there. It does not transport its copper itself; it does not itself market its copper; its copper is sold exclusively by the United Metals Selling Company, an entirely distinct New Jersey corporation, organized for the purpose of selling products, having no place of business in Massachusetts, not even using the office of the Baltic Mining Company in Massachusetts but sending its agents into Massachusetts and other states to sell its wares. Any part of the Baltic Mining Company's business which would constitute the transaction of an interstate business by that company if it were done by itself is in fact done by the United Metals Selling Company.

The plaintiff in error argues that the United Metals Selling Company sells copper as the agent of the Baltic Mining Company and that, therefore, the Baltic Mining Company is engaged in interstate commerce. If, for that reason, the plaintiff in error could be considered as engaged in interstate commerce at all, it could be considered only as indirectly engaged in it. Under the construction of the facts most favorable to

the plaintiff in error only that part of its business which was done through the United Metals Selling Company could be considered as interstate commerce.

But even upon that assumption the Massachusetts place of business was not in any sense used for the part of the business transacted by the United Metals Selling Company. It was not used as a salesmen's headquarters nor a sample room and no sales of products were made through the office. The office was not in any sense a means or instrument of interstate commerce. The office might have been maintained in New York or in any other state instead of in Massachusetts without affecting the interstate commerce of the plaintiff in error. It was not entitled to maintain that office in Massachusetts, therefore, as a matter of right but only as a matter of privilege. It could have renounced the privilege at will and still any part of its business which under the most liberal construction could be considered as interstate commerce could have been carried on in precisely the same manner as that in which it was in fact carried on.

THE S. S. WHITE DENTAL COMPANY WAS ENGAGED BOTH IN INTERSTATE AND INTRASTATE BUSINESS IN MASSACHUSETTS AND MAINTAINED ITS PLACE OF BUSINESS IN BOSTON FOR THE PURPOSES OF BOTH INTERSTATE AND INTRASTATE BUSINESS.

The plaintiff in error argues at length to establish the contention that the S. S. White Company was engaged both in interstate commerce and intrastate commerce in Massachusetts. The agreed facts plainly show, and the defendant in error has never disputed

the fact, that the S. S. White Dental Company, in distinction from the Baltic Mining Company, was to some extent engaged in interstate commerce in Massachusetts. It differs some as to the extent to which it was engaged in interstate commerce, but there is no dispute, at least, upon the point that in negotiating sales in Massachusetts through travelling salesmen for delivery to be made direct from its factories in another state it was engaged in interstate commerce in Massachusetts. On the other hand, there is no dispute on the part of the plaintiff in error as to the fact, which indeed appears in the agreed facts, that fifty per cent. of the sales made at the Boston place of business from the stock there kept on hand, without previous orders, were wholly Massachusetts transactions, the goods being ordered and sold over the counter and delivered to the purchaser over the counter, in hand or by messenger within the State. (White Record, p. 11.) The exact proportion in which the interstate and intrastate business of the corporation was divided does not seem to the defendant in error to be material to the determination of this case.

Osborne *v.* Florida, 164 U. S. 650.

The only thing conditioned in either of the cases at bar was the privilege of maintaining an office in Massachusetts for the purposes of purely local or intrastate business.

If the Baltic Mining Company had chosen to market its own product by interstate sales instead of allowing the United Metals Selling Company to do it, it was at liberty to maintain a place of business within Massachusetts solely as headquarters for its salesmen engaged

in interstate business or for negotiating interstate sales or for any other use which might have been solely for the purposes of interstate commerce without paying any heed to the Massachusetts statute.

The S. S. White Dental Company was at liberty to maintain a place of business in Massachusetts as headquarters for its travelling salesmen or for negotiating interstate sales, or for any other use which was solely for the purposes of interstate business, without paying the slightest attention to Massachusetts laws. It was entitled to maintain the place of business in Massachusetts which it in fact did maintain if it restricted the use of that place of business to the purposes of interstate commerce solely, and used it only as a means and instrument of conducting a wholly interstate business.

The Commonwealth of Massachusetts did not impose, and did not seek to impose, any tax upon the plaintiffs in error for maintaining an office for the purposes of interstate commerce within Massachusetts.

But maintaining a place of business and using that place of business for purposes of strictly local business brought both plaintiffs in error within the regulating power of the Commonwealth. It was for the Commonwealth to say whether it would grant or withhold from the plaintiffs in error the privilege of maintaining those places of business in the Commonwealth, and to fix the conditions upon which it would grant that privilege.

Gibbons *v.* Ogden, 9 Wheat. 1, 7.

MARSHALL, C.J. "The genius and character of the whole government seem to be that its action is to be applied to all the external concerns which affect the States generally; but not to

those which are completely within a particular State and with which it is not necessary to interfere for the purpose of executing some of the general powers of government. The completely internal commerce of a State then may be considered as reserved for the State itself."

This court has repeatedly held that a tax by a state for such a privilege under similar circumstances does not amount to a regulation of interstate commerce.

Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181.

It is hard to conceive of a decision which could be more closely in point with the Baltic Mining Company case than that case. The Pembina Mining Company was a Colorado corporation having in Pennsylvania an office for the use of its officers, stockholders, agents and employees. It was engaged in the same kind of business as the Baltic Mining Company, but could with greater force contend that it was directly engaged in interstate commerce than can the Baltic Mining Company, because the Pembina Mining Company sold its own products and had not let out the marketing of its products to a distinct corporation like the United Metals Selling Company. Under a Pennsylvania statute entitled "An Act to provide Revenue by Taxation", a tax was assessed against that corporation for "office license" for one year at the rate of one-fourth of a mill on each dollar of its capital stock, which tax amounted to $250. A penalty of $125 was also imposed for failure to take out the license. The constitutionality of that tax was assailed on precisely the same grounds

as the excise in the first of the cases at bar, and the tax was sustained as valid.

It is said at page 45 of the brief of the plaintiffs in error, and repeated in other parts of the brief, that the question of interstate commerce was not involved in the Pembina Mining Company case. If it were said that the interstate commerce of that corporation was not involved by the exaction of the license fee by Pennsylvania in that case, there would be some truth in the statement. The statement that no question of interstate commerce was involved in that case is not true. The report of the case and the opinion in the case showed what questions were raised by the case. They show that the main contention in the case was that the tax burdened the interstate commerce of that corporation. The question was fully argued and was answered by the court in this language: —

"A license tax only is exacted as a condition of its keeping an office within the State for the use of its officers, stockholders, agents and employees; nothing more and nothing less; and in what way this can be considered as a regulation of interstate commerce is not apparent."

The case of McCall *v.* California, 136 U. S. 104, instead of regarding the Pembina Mining Company case as not having raised the question as to regulation of interstate commerce, as stated in the brief of the plaintiffs in error, is shown by the very language quoted at page 47 of that brief to have recognized the question as having been raised in that case and determined according to the facts of the case: —

"The State of Pennsylvania, through her proper officers, assessed a tax against the corporation for 'office license', which the

company resisted on the ground that the act under which the assessment was levied was in conflict with the 'commerce clause' of the Constitution of the United States, in that it was an attempt to tax interstate commerce, as such. The Pennsylvania courts affirmed the validity of the assessment and, a writ of error having been sued out, the case was brought here for review. This court held that the state legislation in question did not infringe upon the commercial clause of the Constitution, because it imposed no prohibition upon the transportation into the State of the products of the corporation or upon their sale in the State, but simply exacted a license tax from the corporation for its office in the Commonwealth; and went on to say: 'The exaction of a license fee to enable the corporation to have an office for that purpose within the Commonwealth is clearly within the competency of its legislature. It was decided long ago, and the doctrine has been often affirmed since, that a corporation created by one State cannot with some exceptions, to which we shall presently refer, do business in another State without the latter's consent, express or implied.'"

Kehrer *v.* Stewart, 197 U. S. 60.

That case is almost as closely similar in its facts to the S. S. White Dental Company case as the Pembina Mining Company case is to the Baltic Mining Company case. It has important bearing both as to the effect of the construction of the statute by the State court and as to the right of the State to tax a corporation or person engaged in both interstate and local business for the privilege of carrying on local business.

A statute of Georgia imposed "upon all agents of packing houses doing business in this State, two hundred dollars in each county where such business is carried on." A Chicago firm of packers had a place of business at Atlanta, Georgia, where they sold their

products at wholesale, having in their employ several clerks and helpers, one of whom was the petitioner Kehrer, who was employed as chief clerk and manager. The firm did not have anywhere within Georgia any packing house or manufactory, but took orders which were transmitted and filled at Chicago, the meats being sent to Atlanta and there distributed in pursuance of such orders. *Some meats were also shipped from Chicago to Atlanta without a previous sale or contract to sell.* These were stored in the Atlanta house of the firm in original packages, and were kept and held for sale in the ordinary course of trade as domestic business.

The court sustained the State court in holding that the tax so far as it applied to meats sold in Chicago and shipped to the petitioner in Georgia for distribution, could not be supported; but that so far as the petitioner was engaged in the business of selling directly to customers in Atlanta he was engaged in carrying on an independent business as a wholesale dealer, and was liable to the tax. At page 65 the court said: —

"This decision was correct. . . . The only difficulty in this case arises from the fact that the tax is laid not in terms upon the domestic business nor upon the gross receipts or profits which might be apportioned between interstate and domestic business, but is a gross sum imposed upon the managing agent of packing houses, regardless of the fact that the greater portion of the business may be interstate in its character. This contingency, however, is met by the case of Osborne *v.* Florida, 164 U. S. 650, wherein a license tax imposed upon express companies doing business in Florida had been construed by the Supreme Court of that State as applying solely to business done within the State, and not to its interstate business. Accepting this construction of the State

statute as in reality part of the statute itself, we held that it did not in any way violate the Federal Constitution. The statute was sustained notwithstanding the fact that 95 per cent. of the business was interstate in its character and only 5 per cent. consisted of carrying goods and freight between points within the State of Florida."

Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 44.
Pennsylvania R. R. *v.* Knight, 192 U. S. 21.

In that case a New York statute taxing the railroad for the privilege of running cabs wholly within New York from its terminus was sustained against the contention of the railroad that the cab service was an essential part of its interstate transportation. Brewer, J., in stating the opinion of the court, said, pp. 26, 27: —

"The State may not tax for the privilege of doing an interstate commerce business. On the other hand the cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. . . . Wherever a separation in fact exists between transportation service wholly within the state and that between the states a like separation may be recognized between the control of the State and that of the Nation. . . .

As we have seen, the cab service is rendered wholly within the State and has no contractural or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for and not necessarily connected therewith. But when service is wholly within a State it is presumably subject to state control. The burden is on him who asserts that though actually within it is legally outside the State, and unless the interstate character is established locality determines the question of jurisdiction, — citing Coe *v.* Errol, 116 U. S. 517."

Cooper *v.* Ferguson, 113 U. S. 727, 736.

"It is quite competent no doubt for Colorado to prohibit a foreign corporation from acquiring a domicile in that state and to prohibit it from carrying on within that state its business of manufacturing machinery. But it cannot prohibit it from selling in Colorado by contracts made there its machinery manufactured elsewhere, for that would be to regulate commerce among the states."

See also, Reymann Brewing Co. *v.* Brister, 179 U. S. 445.
Horn Silver Mining Co. *v.* New York, 143 U. S. 305.
Pullman Co. *v.* Adams, 189 U. S. 420.
Allen *v.* Pullman Co., 191 U. S. 171.
Osborne *v.* Florida, 164 U. S. 650.
The Daniel Ball, 10 Wall. 565.
Coe *v.* Errol, 116 U. S. 517.
Detroit, etc., Ry. Co. *v.* Interstate Commerce Commission, 167 U. S. 633.
Rhodes *v.* Iowa, 170 U. S. 412.
Kelley *v.* Rhoades, 188 U. S. 1.
Diamond Match Co. *v.* Ontonagon, 188 U. S. 82.

The right of the State to control internal commerce is recognized even in the case upon which the chief contentions of the plaintiffs in error in the case at bar are based, Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 44. This court there cited and quoted from Allen *v.* Pullman Car Co., 191 U. S. 171, 178, 179, as follows: —

"This court, while recognizing as former cases had done, the exclusive right of Congress to regulate interstate traffic, said that 'the corresponding right of the State to tax and control the in-

ternal business of the State, although thereby foreign or interstate commerce may be indirectly affected, has been recognized with equal clearness' — citing Osborne *v.* Florida, 164 U. S. 650."

In all these cases the question of whether interstate commerce was regulated was involved, but it was held, as a practical matter, that a license fee imposed upon the privilege of doing a local business did not have the effect of a regulation of interstate commerce.

THEY ARE THE CASES WHICH CONTROL THE DECISIONS IN THE CASES AT BAR.

The statement of the plaintiffs in error that in Pembina Mining Co. v. Pennsylvania, Kehrer v. Stewart and other similar cases "no question of interstate commerce was involved", exposes another fallacy in their argument.

The plaintiffs in error, while stating that the necessary operation and effect of the excise is the essential inquiry, nevertheless fail in their argument to make it the essential inquiry. In every case where the court in determining the question whether interstate commerce has been regulated as a practical matter has decided that the tax in question did not, as a matter of fact, burden interstate commerce, the plaintiffs in error urge that the question of interstate commerce was not involved. Such cases are, —

Pullman Co. *v.* Adams, 189 U. S. 429.
Allen *v.* Pullman Co., 191 U. S. 171.
Kehrer *v.* Stewart, 197 U. S. 60.
Osborne *v.* Florida, 164 U. S. 650.
Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181, cited at page 38 of the plaintiffs' brief, and following.

In all these cases the question of regulation of interstate commerce was clearly involved. What was decided was not that that question was not involved, but that in fact interstate commerce was not affected by the application of the special statute under consideration to the special facts of each of those particular cases. The "practical question" was determined in each of those cases in favor of the statute.

A tax is not a regulation of interstate commerce merely because it is assessed upon and paid by a corporation which is engaged in interstate commerce.

The interference with the commercial power, to be unconstitutional must be found to be direct, and "not the mere incidental effect of requirement of the usual proportional contribution to public maintenance."

Postal Telegraph Co. *v.* Adams, 155 U. S. 688.

"It is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution."

State Tax on Railway Gross Receipts, 15 Wall. 284.
Delaware Railroad Tax, 18 Wall. 206.

It is submitted, therefore, that the contention of the plaintiffs in error that the excise in question, measured by one-fiftieth of one per cent of the par value of the capital stock, up to a maximum of $2,000, directly and substantially burdens interstate commerce, and therefore regulates it by its necessary operation and effect, is not sustained by the decisions of this court, but is actually refuted and disproved by the facts in the cases at bar when considered in the light of those decisions.

IV.

THE MASSACHUSETTS EXCISE STANDS THE TEST OF THE PRINCIPLES DECLARED IN WESTERN UNION TELEGRAPH CO. V. KANSAS AND PULLMAN CO. V. KANSAS, AND IS CONSTITUTIONAL UNDER THE COMMERCE CLAUSE.

As the excise in question does not in actual operation and effect directly burden the interstate commerce of the plaintiffs in error, the third contention of the plaintiffs in error, that the unconstitutionality of the Massachusetts excise, under the commerce clause, is conclusively settled by the principles established in the Western Union and Pullman cases, 216 U. S. 1, 56, is by the same token refuted.

This contention of the plaintiffs in error is a mere assertion. No attempt is made to show by the actual application of the principles established in the Western Union and other cases to the special facts in the cases at bar that the excise in question is unconstitutional. The argument of the plaintiffs in error merely transfers *in toto* to the cases at bar the result of the application of those principles to wholly different cases. The argument of the plaintiffs in error loses sight of the fact that establishing principles and applying them to one special case does not automatically decide other cases with different facts.

It would not seem to the defendant in error to be profitable for it to devote its argument to declaring to this court what this court meant by its decisions in such recent cases as the Western Union and Pullman cases; but it may not be amiss for the defendant in

error to state what its understanding is of those decisions in their essential points, as bearing upon the position taken by the defendant in error in the cases at bar.

The defendant in error does not regard those decisions as having been intended to cause a revolution in the law. It does not regard them as having been intended to establish any new principles or to alter any old ones. This court, in the several opinions upon which these plaintiffs in error rely, took special pains to explain that no new doctrine was being declared, and that the decisions being rendered were in harmony with the earlier decisions of the court. The decisions upon which the defendant in error relies in the cases at bar were in no sense overruled by these more recent decisions, but were, in fact, approved and followed so far as they were in point, and distinguished so far as they were not in point. In the Galveston Railway case, 210 U. S., at page 228, the very justices who held the tax invalid in the Western Union case, on account of its effect in actual operation, expressed a strong dissenting opinion holding valid the particular tax under consideration in that case, urging the importance of acceptance of the construction of the State court, and pointing out that the form of the tax was important, and that only direct operation on interstate commerce was objectionable.

The defendant in error therefore considers it still to be the law that the question whether a statute of a State imposing a tax or excise regulates interstate commerce, and is therefore invalid, is a practical question to be determined by analyzing the actual effect of the law in operation, considering it with reference

to the organic law of the State, and with reference to the peculiar facts of each specific case, as cases arise.

If an excise, imposed in accordance with the organic law of the State and as part of a long established system of taxation which has grown up under the protection of explicit decisions of this court, does not in actual operation and effect directly and substantially burden the interstate commerce of a foreign corporation from which the excise is exacted, engaged in both interstate commerce and local business, the defendant in error does not understand that the Western Union and Pullman decisions established any principles under which that excise may be declared invalid.

Flint *v.* Stone Tracy Co., 220 U. S. 107.

We understand that these decisions, read as they should be read, with reference to the facts of the cases upon which the decisions were based, merely decide that the taxes in those cases under discussion, on account of the peculiar facts of those cases, did in actual effect directly and substantially burden the interstate commerce of the corporations subjected to them.

If our understanding of these decisions is correct, it follows that the excise or license fee imposed by Massachusetts upon the privilege enjoyed by the plaintiffs in error in having an office in Massachusetts for the transaction of intrastate business, is not objectionable under the commerce clause of the Constitution of the United States.

V.

THE DECISIONS OF THE MASSACHUSETTS COURT IN THE CASES AT BAR ARE MISINTERPRETED BY THE PLAINTIFFS IN ERROR.

The decisions of the Massachusetts court do not deny to ordinary business corporations engaged to some extent in interstate commerce the protection of the commerce clause of the Constitution.

The Massachusetts court did not hold that the principles of the Western Union and Pullman decisions apply only to quasi-public corporations, and that ordinary trading, manufacturing or mining companies engaged in interstate sales of goods do not come within the protection of the commerce clause.

The decisions of the Massachusetts court nowhere intimate that the principles of the Western Union and Pullman cases apply only to quasi-public corporations. They hold simply that the principles of those cases, as applied to quasi-public corporations of the nature of a telegraph and Pullman car company, produce results different from those produced by the application of the same principles to ordinary mining, mercantile or manufacturing companies engaged to some extent in interstate commerce.

The decisions of the Massachusetts court nowhere intimate that corporations engaged in ordinary trading, manufacturing or mining, engaged in interstate commerce, do not come within the protection of the commerce clause of the United States Constitution against occupation or privilege taxes or license fees. On the contrary, they hold that they do come within

the protection of the commerce clause, and that so far as they are engaged in interstate commerce they may not be affected by the law imposing the excise or fee.

> Attorney-General *v.* Electric Storage Battery Co., 188 Mass. 239.
>
> Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381 (Baltic Record, pp. 17, 18).
>
> S. S. White Dental Manfg. Co. *v.* Commonwealth, 212 Mass. 35 (White Record, p. 23).

Holding as they do that the excise is levied upon the privilege enjoyed by the Baltic Mining Company, of having an office not used for interstate commerce, is not holding that the corporation is not within the protection of the interstate commerce clause. The decision is merely to the effect that since no interstate commerce of the corporation is attacked by the excise, there is no occasion for its protector, the commerce clause of the United States Constitution, to assert itself.

Holding as they do that so far, and only so far, as the S. S. White Company is engaged in intrastate commerce it is subject to the excise, and that any injunction issued to enforce payment of the excise must except so much of the business as is interstate commerce, is not denying the protection of the commerce clause to a manufacturing and mercantile corporation.

The defendant in error makes no distinction between the principles applicable to quasi-public or any so-called interstate commerce corporations and ordinary trading, manufacturing and mercantile corporations engaged to some extent in interstate commerce. The only distinction is in the application of those principles to the

special circumstances of each corporation as a practical question.

The cases of Robbins v. Shelby Taxing District, 120 U. S. 489, and the other drummer and canvasser cases cited by the plaintiffs in error (pages 54 et seq.) have no application to the cases at bar, and the decisions of the Massachusetts court are thoroughly consistent with the decisions in those cases.

Those cases were cases where license fees and taxes were imposed upon the interstate commerce itself. There is no such attempt in the cases at bar. They are valuable in the discussion only as showing the difference between the license fees in those cases which did tax interstate commerce itself and the license fees in the cases at bar which do not. The thing conditioned in the cases at bar is the privilege of maintaining a domicil in Massachusetts solely for the purposes of intrastate business. The plaintiffs in error are free to come into Massachusetts or to send their agents into Massachusetts to sell, offer for sale and deliver their products without paying the slightest attention to the act under discussion. It is only when, as in Kehrer *v.* Stewart, they establish a local domicil and transact purely local business that they become subject in any way to the excise in question.

The plaintiff in error, the Baltic Mining Co., at page 60 of its brief, makes a final desperate effort to show that its Boston office for the "general financial management and direction of the company's affairs" was maintained in part for the purposes of interstate commerce. The agreed facts are against it in this contention, however. The United Metals Selling Company

did all the plaintiff's interstate commerce, and the "direction of the company's affairs" does not mean direction of the United Metals Selling Company's affairs. Its connection with that distinct corporation was not interstate commerce. The sales of the United Metals Selling Company may have been made in such a manner as to constitute interstate commerce, but that company had no Massachusetts office and could come into Massachusetts and sell at will without being required to pay any heed to the excise under discussion. The Baltic Mining Company was not engaged "regularly and directly" in interstate commerce.

VI.

THE EXACTION IN QUESTION DID NOT TAKE THE PROPERTY OF THE PLAINTIFFS IN ERROR WITHOUT DUE PROCESS OF LAW.

The exaction, if true to its history, its nature, its name and its purpose as an excise, did not tax property outside the Commonwealth of Massachusetts.

The contention that the exaction in question, because measured by reference to the par value of the authorized capital stock up to a certain maximum, is a tax upon the property represented by the capital stock of the corporation, is inconsistent with the admission of the plaintiffs in error that the exaction is an excise and in no sense a property tax. What has been said with reference to the nature of the tax and the fundamental distinction between an excise and a property tax and the place of this particular exaction in the Massachu-

setts system of taxation is sufficient answer to the contention that the exaction deprives the petitioner of property without due process of law by taxing property and business beyond the jurisdiction of the Commonwealth.

Since the tax is in its nature an excise, and since under the Constitution of Massachusetts an excise need not be proportional but only reasonable, there is no requirement that the excise in question should be apportioned according to property in fact situated within the Commonwealth of Massachusetts.

An excise under the Constitution of Massachusetts is no different in this respect from an excise under the Constitution of the United States containing a similar provision.

Flint *v.* Stone Tracy Co., 220 U. S. 107, 152.

"If we are correct in holding that this is an excise tax, there is nothing in the Constitution requiring such taxes to be apportioned according to population."

The contention of the plaintiffs in error that the decision of this court in Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, and the other decisions relied upon by the plaintiffs in error, established the principle that if an excise is measured by reference to the capital stock it must for that reason be considered as unconstitutional as taking property without due process of law, is not supported either by the decisions in those cases or by the comments of this court upon those decisions in Flint *v.* Stone Tracy Co.

Flint *v.* Stone Tracy Co., 220 U. S. 107, 163.

After stating what was decided by the court in the cases of Southern Railway Co. *v.* Greene, 216 U. S. 400, Galveston, etc., Ry. Co. *v.* Texas, 210 U. S. 217, and Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, this court said: —

"There is nothing in these cases contrary, as we shall have occasion to see, to the former rulings of this court which hold that where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the state or nation the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property."

Citing, Provident Institution *v.* Massachusetts, 6 Wall. 611, 627,

in which case this court said that reference to the par value of the capital stock "is made not as descriptive of the subject to be assessed."

The exaction in question in actual operation and effect is true to its nature, history, name and purpose.

The facts which prove that the exaction in question does not in fact operate as a regulation of interstate commerce also establish the fact that the exaction in operation and effect does not tax property or business outside the Commonwealth.

In the cases at bar there is no effort made to get at the capital of the plaintiffs in error. The sum exacted is in itself reasonable. As suggested by the Massachusetts court, "a flat rate of $2,000 might have been charged all foreign business corporations without violating any right guaranteed by the Constitution of the

United States." (S. S. White Dental Co. *v.* Commonwealth, Record, p. 24.) It in no way conditions the right to do interstate business. That license fee is not a tax on copper or upon dental goods or upon agents, solicitors, distributing agencies or store-houses of unbroken original packages, or upon importation or upon the right to sell or buy goods upon interstate bargains. The statute merely says to the plaintiffs in error: "The Commonwealth of Massachusetts recognizes your right to engage in interstate commerce within its borders without its permission, and for that purpose to use the necessary means and instruments of interstate commerce without fee; but if you wish to use one of the privileges granted by the Commonwealth of having a domicil for local business in Massachusetts, you may have it by paying an amount equal to one-fiftieth of one per cent. of the amount of the par value of your authorized capital stock, the payment not, however, to exceed $2,000. Having elected to accept and use the privilege, you owe the Commonwealth $500 and $200, respectively."

In the Western Union and Pullman cases, relied upon by the plaintiffs in error, the charter fees in question were found to burden so directly interstate commerce that whatever their form they did in fact operate as taxes upon that interstate commerce and upon the property employed in that interstate commerce.

There is no such situation in the cases at bar. The exaction in the cases at bar, instead of operating necessarily to burden interstate commerce is by its nature and by the construction given to the statute by the courts of Massachusetts necessarily prevented

from operating in such a manner as to regulate interstate commerce.

In the Western Union and Pullman cases the property and business of the corporations were so essentially a unit that any charge for the privilege of doing local business necessarily operated as a charge for doing interstate business. That the business of such corporations is peculiarly a unit is demonstrated by the fact that this court has countenanced a unit rule of taxation as applied to such corporations.

> Adams Express Co. *v.* Ohio, 165 U. S. 194, 220, and cases cited.

The interstate and local business of the plaintiff in error are not so unified. No such effect results from a license fee charged for the privilege of maintaining a domicil for local business. To demonstrate this fact with reference to the Baltic Mining Company it is only necessary to point out that its interstate commerce is so separable from its local business as to be entirely transferred to a distinct corporation, the United Metals Selling Company. To demonstrate the fact with reference to the S. S. White Dental Company it is only necessary to quote from the petition. (White Record, p. 4.)

> "And such office and usual place of business is used mainly for the interstate commerce portions of its business, or purposes incident thereto, *which have no material reference to the domestic portion of its business.*"
>
> "And by far the larger part of its capital, property and assets are used and employed for the purposes of the interstate commerce

portion of its business, *and in no way concerns the domestic or intrastate portion of its business conducted wholly within said Commonwealth.*

If the exaction in question does not tax property and does not regulate interstate commerce, it is not unconstitutional merely on account of the mode of its measurement.

Since the tax is an excise and not a property tax, the Legislature of Massachusetts has wide discretion in choosing the mode of measuring the tax. If it is within the jurisdiction of Massachusetts to license the privilege, this court is not interested in the amount of the license fee.

Delaware Railroad Tax, 18 Wall. 206, 231.
Kentucky Union Co. *v.* Kentucky, 219 Mass. 140, 151.
Horn Silver Mining Co. *v.* New York, 143 U. S. 305, 317.

"The extent of the tax is a matter purely of State regulation, and any interference with it is beyond the jurisdiction of this Commonwealth."

Patton *v.* Brady, 184 U. S. 608.

"It is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed."

Flint *v.* Stone-Tracy Co., 220 U. S. 107, 167.

"We must not forget the right to select the measure and objects of taxation devolves upon the Congress and not upon the courts, and such selections are valid unless the constitutional limitations are overstepped."

McCray *v.* United States, 195 U. S. 27, 58, and cases cited.

VII.

THE STATUTE IN QUESTION DOES NOT DENY THE PLAINTIFFS IN ERROR THE EQUAL PROTECTION OF THE LAWS.

It applies alike to all corporations in the same situation.

Much of what has been said with reference to the powers of control over things within the jurisdiction of a State is applicable to the question whether the plaintiffs in error are denied equal protection of the laws by this statute, and need not be repeated.

Southern Railway Co. *v.* Greene, 216 U. S. 400.

"Equal protection of the laws means subjection to equal laws applying alike to all in the same situation."

The statute in question applies to all foreign business corporations of the classes comprehended within St. 1903, c. 437, the provisions of which have already been quoted. Corporations of classes to which the Legislature has not considered this mode of taxation adapted on account of the nature of their business and the manner of its transaction were expressly excluded from the act, and distinct provisions of law applying to all corporations in like situations are enacted for the taxation of those excluded corporations.

The classification is reasonable.

There is nothing unreasonable in providing that foreign business corporations of the same general type, such as mining, mercantile and manufacturing corporations, shall be classified for purposes of taxation in a class distinct from telephone, street railway, railroad or insurance companies.

Bell's Gap R.R. Co. *v.* Pennsylvania, 134 U. S. 232.

"The provision in the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways."

Brown-Forman Co. *v.* Kentucky, 217 U. S. 563, 572.

"Fundamental to the very existence of the governmental power of the States as is this function of taxation, it is nevertheless subject to the beneficent restriction that it shall not be so exercised as to deny to any the equal protection of the law. But this restriction does not compel the adoption of 'an iron rule of equal taxation', nor prevent variety in methods of taxation or discretion in the selection of subjects, or classification for purposes of taxation of either properties, businesses, trades, callings or occupations. This much has been over and over announced by this court. Bell's Gap Rd. *v.* Pennsylvania, 134 U. S. 232; Cargill Co. *v.* Minnesota, 180 U. S. 452; Missouri, Kansas and Texas Railway Co. *v.* May, 194 U. S. 267; Cook *v.* Marshall County, 196 U. S. 268; Williams *v.* Arkansas, 217 U. S. 79; Southwestern Oil Co. *v.* State of Texas, 217 U. S. 114."

See also, Adams Express Co. *v.* Ohio, 165 U. S. 194, 228.

The statute does not discriminate against the plaintiffs in error.

The plaintiffs in error rely upon the decision in Southern Railway Co. *v.* Greene, 216 U. S. 400, in support of their contention that they are denied the equal protection of the laws. That decision, it is submitted, does not support the contention. In that case there was clear discrimination against foreign corporations as distinguished from domestic corporations. A foreign corporation *had for years paid the same license tax and the same property tax as were paid by domestic corporations* doing business in the State, and under direct sanction of the laws of the State had acquired a large amount of permanent investments therein. The State attempted to subject it to a further tax solely on the ground that it was for the privilege of doing business as a foreign corporation, without subjecting domestic corporations to any similar burden. On account of this discrimination, and also on account of the fact that the tax did in effect regulate interstate commerce, this court held the tax unconstitutional.

No such situation exists in the cases at bar. It is true that by amendment of the statute, in 1907, the amount of the license fee exacted from foreign corporations for having a domicil for local business in Massachusetts was increased in amount. In making this increase in amount, however, the Legislature in no sense discriminated against foreign corporations. Previous to that change in the law foreign corporations had enjoyed an advantage over domestic corporations. The effect of the amendment of 1907 was merely to diminish to some extent the amount of that advantage.

Such an attempt at equalization of the burdens of taxation does not deny to the plaintiffs in error the equal protection of the laws.

S. S. White Dental Co. *v.* Commonwealth, (Record, p. 27).

"It surely cannot be the law that all efforts at equalization of the burdens of government are impossible and unlawful, for the reason that those who have heretofore enjoyed an undue advantage may be deprived of their preference."

The statement of the plaintiffs in error that "no similar change was made at the same time with reference to the domestic corporations having the same kind of property and engaged in the same line of business" is misleading unless it is followed by an examination of the statutes of Massachusetts, which clearly show that foreign and domestic corporations have never been placed upon literally the same basis as to excises. Since excises exacted from domestic corporations had never been the same as those exacted from foreign corporations, and foreign corporations had been favored by the earlier law, it is clear that there is no reason why there should have been a similar change made with reference to taxation of domestic corporations at the time of the amendment of 1907 with reference to foreign corporations. The excise tax upon domestic corporations is assessed under St. 1909, c. 490, Part III., §§ 41 and 43, which provide as follows: —

"SECTION 41. The tax commissioner shall ascertain from the returns or otherwise the true market value of the shares of each corporation subject to the requirements of the preceding section, and shall estimate therefrom the fair cash value of all of said shares

constituting its capital stock on the preceding first day of May, which, unless by the charter of a corporation a different method of ascertaining such value is provided, shall, for the purposes of this part, be taken as the true value of its corporate franchise. From such value there shall be deducted:

First, In case of a railroad corporation, or telegraph, street railway or electric railroad company, whether chartered or organized in this commonwealth or elsewhere, so much of the value of its capital stock as is proportional to the length of that part of its line, if any, lying without the commonwealth; and also the value of its works, structures, real estate, machinery, underground conduits, wires and pipes, subject to local taxation within the commonwealth.

Second, In case of such a domestic telephone company, the amount and market value of all stock in other corporations held by it upon which a tax has been paid in this or other states for the twelve months last preceding the date of the return; and in case of such a foreign telephone company, so much of the value of its capital stock as is proportional to the number of telephones used or controlled by it or under any latters patent, owned or controlled by it without the commonwealth. In case of a telephone company, whether chartered or organized in this commonwealth or elsewhere, the value of its works, structures, real estate, machinery, underground conduits, wires and pipes, subject to local taxation within the commonwealth.

Third, In case of a domestic business corporation, the value of the works, structures, real estate, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, and of securities which if owned by a natural person resident in this commonwealth would not be liable to taxation; also the value of its property situated in another state or country and subject to taxation therein; but the tax commissioner in determining for the purposes of taxation the value of the corporate franchise of any such corporation shall not take into consideration any debts of such corporation unless the returns required from it contain a statement duly signed and sworn to,

setting forth that no part of such debts was incurred for the purpose of reducing the amount of taxes to be paid by it.

Fourth. In case of corporations subject to the requirements of the preceding section, other than railroad corporations, telegraph, telephone, street railway and electric railroad companies, whether chartered or organized in this commonwealth or elsewhere, and of domestic business corporations, the value as found by the tax commissioner of their works, structures, real estate, machinery, underground conduits, wires and pipes, subject to local taxation wherever situated.

For the purposes of this section the tax commissioner may take the value at which such works, structures, real estate, machinery, poles, underground conduits, wires and pipes are assessed at the place where they are located as the true value, but such local assessment shall not be conclusive of the true value thereof.

. . . . . .

Section 43. Every corporation subject to the provisions of section forty shall annually pay a tax upon its corporate franchise, after making the deductions provided for in section forty-one, at a rate equal to the average of the annual rates for three years preceding that in which such assessment is laid, the annual rate to be determined by an apportionment of the whole amount of money to be raised by taxation upon property in the commonwealth during the same year, as returned by the assessors of the several cities and towns under the provisions of section ninety-three of Part I, after deducting therefrom the amount of tax assessed upon polls for the preceding year, as certified to the tax commissioner, upon the aggregate valuation of all cities and towns for the preceding year, as returned under sections fifty-nine and sixty of Part I; but the said tax upon the value of the corporate franchise of a domestic business corporation, after making the deductions provided for in section forty-one, shall not exceed a tax levied at the rate aforesaid upon an amount, less said deductions, twenty per cent in excess of the value, as found by the tax commissioner, of the works, structures, real estate, machinery, underground

conduits, wires and pipes, and merchandise, and of securities which if owned by a natural person resident in this commonwealth would be liable to taxation; and the total amount of tax to be paid by such corporation in any year upon its property locally taxed in this commonwealth and upon the value of its corporate franchise shall amount to not less than one tenth of one per cent of the market value of its capital stock at the time of said assessment as found by the tax commissioner. If the return from any city or town is not received prior to the twentieth day of August, the amount raised by taxation in said city or town for the preceding year, as certified to the secretary of the commonwealth, may be adopted for the purpose of this determination."

It will be seen from an examination of these provisions that the measure of the tax upon domestic corporations is by an entirely different mode from that employed for measuring the excise tax on foreign corporations.

"Equal laws" are not necessarily *identical* laws. The plaintiffs in error do not show and cannot show any discrimination as between them and domestic corporations. It is not enough to show that the laws applicable to them are different from the laws applicable to foreign corporations. No allegation is made and no contention could be sustained to the effect that under the Massachusetts system of taxation foreign corporations are unduly burdened, or burdened more than domestic corporations in general, and that discrimination is made against them solely on the ground that they are foreign corporations.

VIII.

THE REQUESTS FOR RULINGS MADE BY THE PLAINTIFFS IN ERROR WERE PROPERLY REFUSED BY THE MASSACHUSETTS COURT.

All the rulings requested by the Baltic Mining Company and all the rulings requested by the S. S. White Dental Company, except the sixth, were to the effect that the statute under consideration was unconstitutional for various reasons, all of which reasons have been sufficiently discussed. Applying to the special facts of the cases at bar the principles of the very cases upon which the plaintiffs in error rely, these requests for rulings were properly refused.

The sixth request of the S. S. White Dental Company was properly refused for several reasons, among which are the reasons that part of the request is immaterial for the purposes of a decision of the case, and the court was therefore not required to make a ruling upon that part; and that portions of the request did not accurately state the law.

Coe *v.* Errol, 116 U. S. 517.
Pennsylvania R.R. *v.* Knight, 192 U. S. 28.
Bacon *v.* Illinois, 227 U. S. 504.

Respectfully submitted,

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